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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1926

No. 372

B. B. MORRIS, DOING BUSINESS AS MORRIS &
LOWTHER; H. M. HEWITT AND LEW NUNA-
MAKER, ETC., ET AL., APPELLANTS,

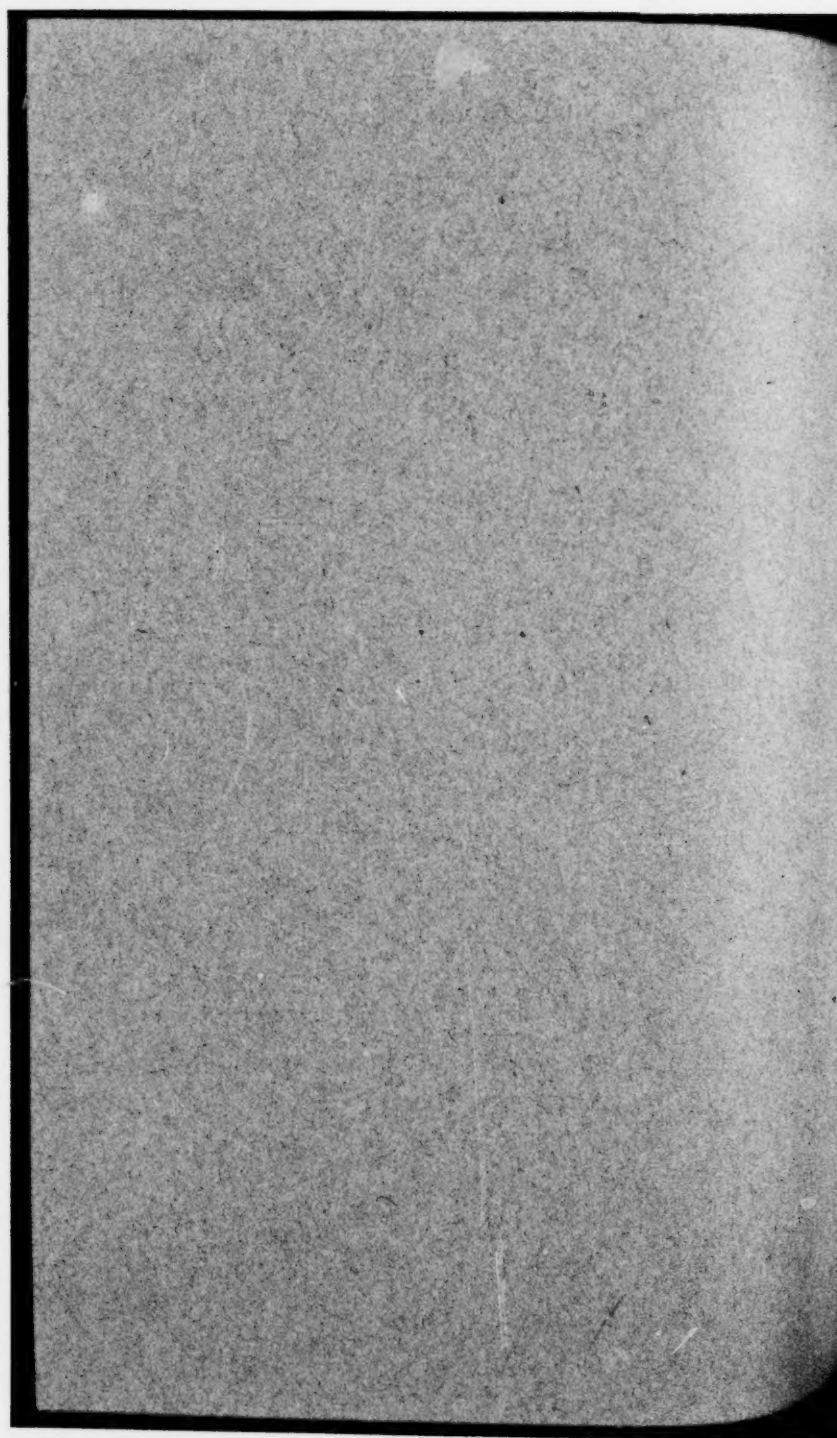
vs.

WM. DUBY, H. B. VAN DUZER, AND W. H.
MALONE, ETC,

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF OREGON

FILED MAY 12, 1926

(31,926)



(31,926)

SUPREME COURT OF THE UNITED STATES

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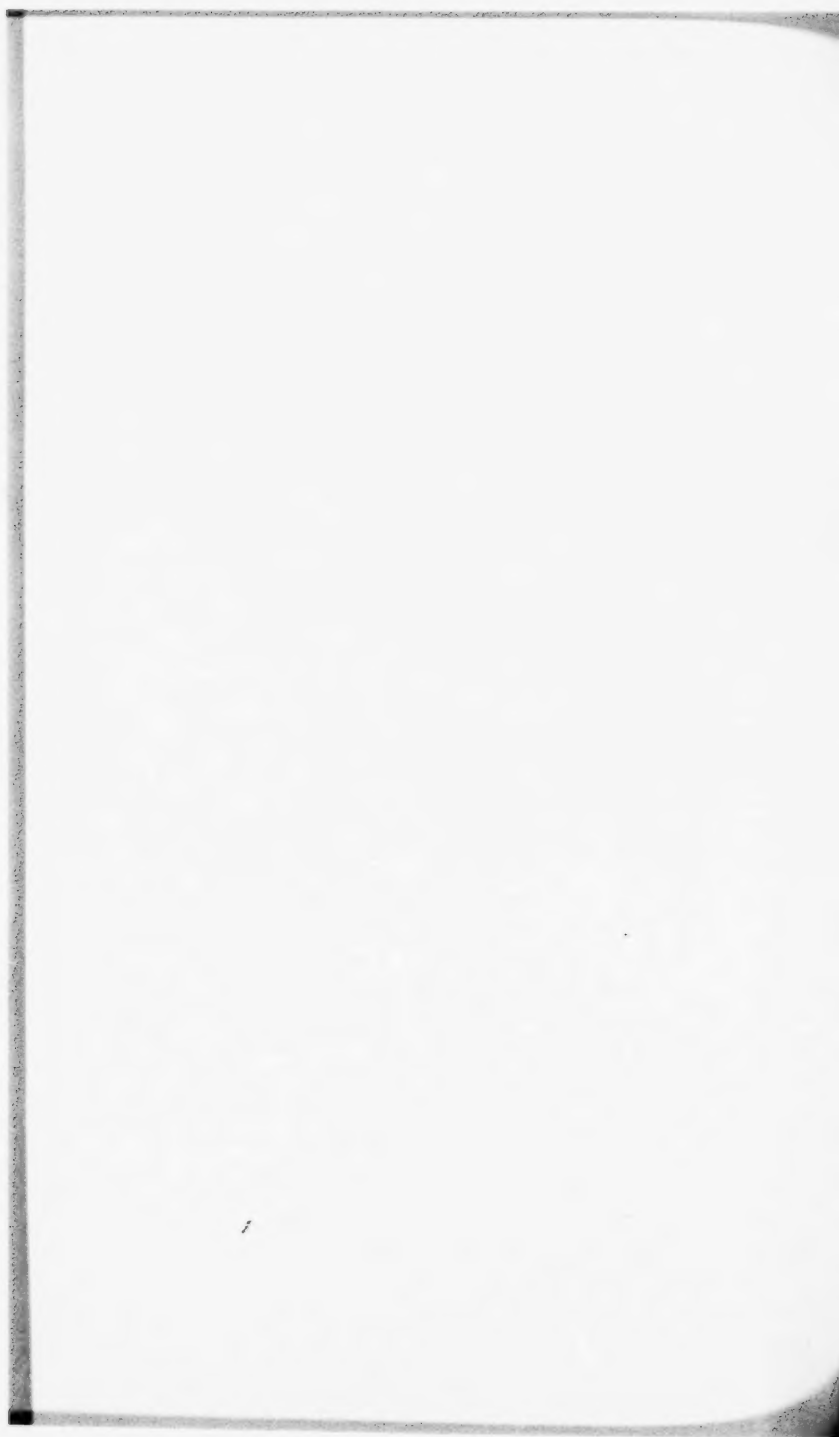
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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF OREGON

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NAMES AND ADDRESSES OF THE ATTORNEYS OF RECORD

W. R. Crawford, 325 Lumber Exchange Building, Seattle, Washington.

I. H. Van Winkle, Attorney General of the State of Oregon, and J. M. Devers, Assistant Attorney General of the State of Oregon, Salem, Oregon, for the appellee.

[fol. 2]

**IN UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF OREGON**

No. 8778-E. In Equity

R. B. MORRIS, Doing Business as Morris & Lowther; H. M. Hewitt and Lew Nunamaker, Doing Business as John Day Valley Freight Line; H. L. Livingston, Doing Business as Bend-Portland Transit, and Portland Hood River Truck Line, Inc., Plaintiffs,

vs.

WM. DUDY, H. B. VAN DUZER, and W. H. MALONE, as the Oregon State Highway Commission, Defendants

AMENDED BILL OF COMPLAINT—Filed January 25, 1926

To the Honorable Judges of the District Court of the United States for the District of Oregon, sitting in equity:

The plaintiffs, R. B. Morris, doing business as Morris & Lowther, H. M. Hewitt and Lew Nunamaker, doing business as John Day Valley Freight Line, H. L. Livingston, doing business as Bend-Portland Transit and Portland Hood River Truck Line, Inc., bring this their amended bill of complaint, by leave of Court obtained, on behalf of themselves and all other members of the Auto Freight Transportation Association of Oregon and Washington, a co-operative association, against Wm. Dudy, H. B. Van Duzer and W. H. Malone, composing the Oregon State Highway Commission, defendants: And thereupon plaintiffs com-

plain of the defendants and show unto Your Honors as follows:

1

That the plaintiffs R. B. Morris, is now and has been for more than Four and One-half Years last past, an owner and operator of motor trucks, carrying freight of all classes for compensation from Portland, Oregon, on the Columbia River Highway to The Dalles, Oregon and intermediate points and is now and has for such years last past rendered such service daily as a common carrier; that the plaintiffs H. M. Hewitt and Lew Nunamaker now and have been for more than Six Months last past the owners and operators of motor trucks carrying freight for compensation on the [fol. 3] Columbia River Highway from Portland, Oregon through The Dalles into John Day Valley; the plaintiff H. L. Livingston, is now and has been for more than Seven Months last past an owner and operator of motor trucks, carrying freight for compensation on the Columbia River Highway from Portland, Oregon through The Dalles on to the Dalles-California Highway; and the plaintiff, Portland Hood River Truck Line, Inc., is now and has been for more than Five Months last past, an owner and operator of motor trucks, carrying freight for compensation on the Columbia River Highway from Portland, Oregon to The Dalles, Oregon.

That the said plaintiffs, and each of them, have been required and compelled to obtain permits from the Public Service Commission of Oregon in order to operate their said motor trucks on the public highways of the State of Oregon carrying freight for compensation and said plaintiffs, and each of them, have paid the required fee to said Public Service Commission for such permits; and further under the provisions of said Public Service Law and the rules and regulations of the Commission, the plaintiffs, and each of them, were required to and did file with said Commission the tariff and schedule of operation, including the termini and route to be operated on; that such tariff and schedules so filed fixed reasonable, just and remunerative charges on the freight so carried and such rates were based upon the capacity of the said motor trucks so owned and operated as aforesaid; that under the provisions of

said Public Service Law such scheduled rates can not be changed without a hearing and in no event could the Public Service Commission fix any rate except a reasonable, just and remunerative rate and that the scheduled rates so filed could not be lowered without compelling these plaintiffs, and each of them, to carry such freight on such motor trucks except at a price which would destroy and confiscate these plaintiffs property rights and business, that further the plaintiffs, and each of them, were required to and did pay to the State of Oregon license fees to operate on the said Columbia River Highway, which license fees were [fol. 4] graduated according to not only the capacity of the motor trucks but also on the width of the tires thereof, and these plaintiffs, and each of them, have paid the license fees, including the fee on the tires, for the carrying of the maximum capacity of the weight and load; that the plaintiffs, and each of them, were and are now wasted with the right and privilege of operating their said motor trucks carrying freight for compensation on the Columbia River Highway from Portland, Oregon to or through The Dalles, Oregon with the limitation of the gross weight of truck and load of 22,000 pounds and for all of which rights and privileges were acquired under the Laws of the said State of Oregon and for which these plaintiffs, and each of them, were compelled to and have paid.

That these plaintiffs, and each of them, have and are delivering freight at their termini at Portland, Oregon of The Dalles, Oregon, to other carriers of motor trucks for carriage in and out of the State of Oregon as a continuous service, to-wit, interstate commerce; that these plaintiffs, and each of them, are giving a service to the public not only along the said Columbia River Highway Multnomah County and Hood River but also outside of the State of Oregon which is not and has been for many years constant and efficient and that the public demand the continuance of the present rates and service, which service is one made along the highway at the doors of the consignee without additional charge.

That these plaintiffs are and have been members of the Auto Freight Transportation Association of Oregon and Washington, and such association has leased and is operating a Terminal in the City of Portland, Oregon, which build-

ing was built exclusively for the use of said association at a cost of Two Hundred and Eighty Five Thousand (\$285,000.00) dollars, including the value of the land approximately Eighty Five Thousand (\$85,000.00) dollars and such property occupies 40,000 square feet and has a building Four stories in height on portion of said property.

[fol. 5] That the city of Portland, Oregon, compelled these plaintiffs, as well as all other truck operators, similarly situated, to install a terminal of such character in said City, which has been done and the same has been operating for a number of years and that these plaintiffs, and each of them, are compelled to pay their proportionate share of the expenses of such terminal.

That these plaintiffs, and each of them, as well as other members of said association, have been increasing the volume of their business and have and are now furnishing the public a service which is demanded by public convenience and necessity.

II

The defendants, Wm. Duby, H. B. Van Duzer and W. H. Malone, are the duly qualified and acting board of the Oregon State Highway Commission, with offices at Salem, Oregon.

III

That Congress on July 11, 1916, enacted an Act entitled "An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes."

That according to the provisions of said act the Federal Government agreed to furnish moneys to the States for the purpose of aiding in the building of rural post roads, provided any State desiring such aid would first pass necessary legislation adopting the provisions of such act.

That thereafter the legislature of Oregon duly enacted a certain law, entitled "An Act to accept the benefits of the Act passed by the Sixty-fourth Congress of the United States, entitled "An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes," and to provide for the issuance of bonds of the State of Oregon to raise such money as may

be required to meet the requirements of said Federal statute, and to authorize the State Board of Control to take action and to perform such duties as may be necessary to meet the requirements of said Federal Act and Federal officials acting under said Act."

[fol. 6] The above act being Chapter 175 of the General Laws of Oregon 1917. Such law went into force and effect on or about February 17, 1917. Such law is herein referred to and made a part hereof the same as if set out in full.

That the State of Oregon duly enacted a certain law entitled "An Act to provide for the construction of roads and highways in the State of Oregon; to provide for the issuance of bonds by the State of Oregon to raise money to carry out the purposes of this Act; to authorize the State Highway Commission to take such action and perform such duties as may be necessary to meet the requirements of this Act; to designate and authorize the construction of certain hard-surfaced highways and certain post roads and certain forest roads, and to provide for the letting of contracts for the construction, paving and maintenance of roads and highways; to make the surplus arising from the fees collected under House Bill No. 509 of the present legislative session a fund under the jurisdiction of the State Highway Commission with which to pay interest and principal on the bonded indebtedness of the State, contracted by the State for road purposes, and other lawful claims incurred by said Commission, and to provide modifying the terms of House Bill No. 21 passed by the Twenty-ninth Legislative Assembly of the State of Oregon, and to provide for submitting this Act to the people and for the calling of a special election therefor, and declaring an emergency."

The above Act is Chapter 423 of the General Laws of Oregon 1917. Such law is herein referred to and made a part hereof the same as if set out in full.

That section 6 of the above law determined that certain highways should be permanently constructed and finished with a hard surface. In subdivision 4 of said section 6 the following portion of the Columbia River Highway between the Multnomah County line Easterly through the City of Hood River and Hood River County, etc., was determined to be permanently constructed and paved.

That thereafter Congress duly amended the said rural post road act which had been enacted on July 11, 1916, by an Act entitled "An Act to amend the Act entitled 'An Act to provide that the United — shall aid the States in the construction of rural post roads, and for other purposes,' approved July 11, 1916, as amended and supplemented and for other purposes."

Such amended Act was passed November 9, 1921, and is [fol. 7] now in full force and effect.

That said State of Oregon has received many hundreds of thousands of dollars from said Federal Government under the provisions of said Federal Acts, and is now receiving many hundreds of thousands of dollars yearly under said Acts. That such portion of the said Columbia River Highway between the Multnomah County Line and Hood River, is 22.11 miles, in length, and that such portion of said Columbia River Highway is a part of the Interstate Highway constructed and used from Astoria, Oregon, into the States of Washington and Idaho, and further such portion of said Columbia River Highway is covered within the provisions of said Federal Highway Acts and moneys have been received by the said State of Oregon in the construction and reconstruction of such portion of said highway under and subject to the provisions of said Federal Highway Acts. That since January 20, 1920, such portion of said highway has been from time to time improved and reconstructed by widening such highway and straightening out the same at divers points. All under the provisions and subject to the said Federal Highway Acts.

IV

That at the time of the adoption of the said Federal Highway Act by the State of Oregon in the year 1917, as aforesaid, the State of Oregon permitted, allowed and encouraged the highways of said State to be used for the carrying of freight on motor trucks and declared that the limit was 5 Tons capacity. That some of these plaintiffs, as well as other members of the said Auto Freight Transportation Association of Oregon and Washington had operated their said motor trucks constructed for the carry-

ing of freight limited to 5 Ton capacity, and that thereafter the State of Oregon enacted a law which for the first time fixed the load limit of the gross weight of truck together with the weight of the freight. That up to the year 1921 the said State Highway Commission and the County Courts had never been vested with jurisdiction and authority to [fol. 8] modify, amend or change the said provisions of any laws of the State of Oregon relating to the capacity of any motor truck or the said gross weight of said motor truck and load.

That after the adoption of the said "Federal Highway Act," as aforesaid, and receiving the said moneys from the said Federal Government subject to the terms and conditions of the said "Federal Highway Act," and after the construction or reconstruction, not only of that portion of the said Columbia River Highway between Multnomah County and Hood River, but also West from said Multnomah County Line to Astoria, Oregon, and East from Hood River to The Dalles, by permanently constructing the same by hard-surfacing the same with pavement, the State of Oregon in the year 1921 enacted the following law:

"An Act providing for regulating the use, registration, licensing, taxing, identification, conduct and operation of vehicles and bicycles in the State of Oregon; and for the protection of same; the registration and licensing for persons operating same; providing for punishment for violations of this act; prohibiting the unauthorized use or possession of a vehicle; limiting the authority of cities and towns on subjects concerned with said vehicles and bicycles; providing for the disposition of funds derived from the operation of this act, and repealing sections 2223-1, 4768, 4769, 4770, 4771, 4772, 4773, 4774, 4775, 4776, 4777, 4778, 4779, 4780, 4781, 4782, 4783, 4784, 4785, 4786, 4787, 4788, 4789, 4790, 4791, 4792, 4793, 4794, 4795, 4796, 4798, 4799, 4800, 4802, 4803, 4804, 4805, 4806, 4807, 4809, 4810, 4811, 4812, 4813 and 4814, Oregon laws, and all other acts and parts of acts in conflict herewith."

Such above law is Chapter 371, laws of 1921 special session. Such law is herein referred to and made a part hereof the same as if set out in full.

That section- 35 and 36 of said law of 1921 and section 36-A, an amendment made in the year 1923, being General Laws of Oregon p. 204, provided that the Highway Commission and County Court may grant special permits to move any vehicles, article, property, or thing having a combined weight of Twenty-two thousand pounds upon the giving of a bond to indemnify the State or County for any damage to the highway that may be caused therefrom; and further the State Highway Commission and County Courts were authorized to limit weights and speed and close highways "Whenever the highway commission or any county court or [fol.9] board of county commissioners of any county of this state shall find that any public highways of the state or section thereof is being damaged by reason of being subjected to any particular kind or character of traffic * * *, and for the protection from undue damages of any highway or highways, or of any section or sections thereof and, with respect to such highway or any sections thereof, to reduce the maximum weights and speed in this act, * * * and is hereby authorized and empowered to determine and fix the reduced weights and speeds, which shall be the maximum weight and speed for vehicles or things moving over such highway or highways or any sections thereof," and further section 36-A provides that an operator of a motor vehicle is liable for damages to highways. The said section 36 prescribes penalties amounting not to exceed a \$400.00 fine or imprisonment in a county jail for not to exceed one year, or by both such fine and imprisonment. That the said law of 1921, as amended in 1923, reaffirmed the gross weight of trucks and loads and fixed the speed of same based upon such *upon such* gross weight, and further fixed the said rubber tax per inch and forcing the width of tires depending upon the said gross weight.

That after an elapse of more than Four years of operation over said portion of said Columbia River Highway, as aforesaid, and after the passage of said law of 1921, the said defendants, composing the State Highway Commission, did on or about the 28th day of August, 1925, issue an order reducing the legal maximum, gross weights of trucks and loads on that portion of the Columbia River Highway between Multnomah County and Hood River,

Oregon. A copy of such order is herein referred to and attached herewith and made a part hereof marked exhibit "A."

That the said defendants issued such order without any notice to these plaintiffs or any other person, firm or corporation interested and no evidence was ever considered or furnished by these or any plaintiffs or other person, firm or corporation interested, as no opportunity was ever given to these plaintiffs or any other person, firm or corporation [fol. 10] interested to present to the said defendants any evidence in connection with such order, but said order was issued ex parte on the said defendants' own initiative.

That said order was issued by said defendants to take effect and to be in full force from and after October 1, 1925.

That the said plaintiffs and other members of the said Auto Freight Transportation Association of Oregon and Washington, were forced to, under the said law fixing the said weight, and did purchase and pay for motor trucks constructed for the purpose of carrying the said maximum load of 22,000 pounds gross weight of truck and load; that the weight of said motor trucks without load vary from 10,500 pounds to 12,000 pounds; that the load capacity of said trucks varied from 11,500 pounds to 10,000 pounds; that schedule of rates had been filed and were now in force and have been in force for many years between Portland, Oregon and to or through The Dalles and such schedule of rates had been and were fixed and determined by the gross weight of 22,000 pounds of truck and load; that the said Columbia River Highway from Portland to and through The Dalles is situated adjacent and parallel to an existing and operating railroad which serves the territory along the Columbia River Highway and also steamboats operate on the Columbia River, being in competition with these plaintiffs also, and that the rates of such other common carriers were taken into account in the fixing of the rates by these plaintiffs; that these plaintiffs, in order to raise their rates, must make application to the Public Service Commission and show that such additional increase of rates would be reasonable and just and that in order to operate such motor trucks on such portion on said Columbia River Highway, these plaintiffs must charge and collect a rate which will be

practically twice the rate now charged and collected from the termini Portland and The Dalles and beyond, and further will destroy the interstate business which has been developed, as aforesaid, between the States of Oregon, [fol. 11] Washington and Idaho; that the said plaintiffs will not be able to increase the said rates over the rates now on file with said Public Service Commission, as such additional rates would be unreasonable and unjust to the public; and also such additional increased rates would destroy any competition now existing along the said Columbia River Highway, as aforesaid.

V

That the portion of said Columbia River Highway from Portland to the East Line of Multnomah County and adjacent to the portion of said Columbia River Highway mentioned in the aforesaid order, was constructed and hard-surfaced by pavement approximately Eleven years ago, and such portion of said highway from Hood River East was constructed and hard-surfaced by paving about Five years ago, and at the same time the said portion of said highway as set out in the said order was also hard-surfaced by paving, namely Five years ago.

That such portion of the Columbia River Highway from Portland to The Dalles was constructed and reconstructed, after the adoption of the said "Federal Highway Act" in the year 1917, under the direction and control of the State Highway Commission of the State of Oregon as so required by the said "Federal Highway Act." That since the said year 1917 and prior thereto, motor trucks of the same size, weight and carrying capacity, to-wit a gross weight of 22,000 pounds, were and have been operated over and along the said Columbia River Highway from Portland to The Dalles and beyond, and that as provided for in the said "Federal Highway Act" the said Federal aided highways, including that portion of the Columbia River Highways set out in the said order herein, were to be constructed and reconstructed not only to take care adequately of the then traffic on such highways, but also to take care of the future traffic on such highways.

That in the year 1920 after the construction and reconstruction of such highway, as set forth hereinabove,

about Four motor trucks carrying freight with the maximum gross weight of 22,000 pounds were operated and that since such time the number has been increasing until in the year 1925 Nine trucks of such gross weight were operating on said Columbia River Highway between Portland and The Dalles and beyond, and that in 1925 the other motor vehicles on such highway between said points had increased to an average daily of about 1,500 cars, and also motor trucks, called motor busses, which have been and are now operating carrying passengers for compensation on said highway between said points which weigh with the maximum load of passengers and baggage approximately 16,000 pounds, such motor busses exceed in number the said motor trucks operating with the said gross weight of 22,000 pounds, and that all of said motor vehicles, except motor trucks, including the said motor busses operate at the maximum speed of 30 Miles per hour.

That these plaintiffs deny the statements contained in such order that the said Nine motor trucks limited to the speed of 12 miles per hour are damaging and destroying the said portion of the said Columbia River Highway between the East line of Multnomah County and Hood River, and further the plaintiffs aver that the said portion of said highway is in as good a condition as it has been for years and has not been and is not now being damaged or destroyed as set forth in said order by either the operation of said Nine motor trucks or the said motor busses or the said automobiles and further plaintiffs aver that the portions of the said Columbia River Highway West from the said East Line of Multnomah County to Portland and from Hood River to The Dalles are in the same good condition and are not and have not been damaged and destroyed by the operation of all the said motor vehicles including the said motor trucks.

These plaintiffs have been informed and believe the fact to be and upon such information and belief allege that the [fol. 13] said State Highway Commission, defendants herein, admit that said order so made was not based upon the present or past damage or destruction of said portion of said highway, but solely upon a fear that the said Nine motor trucks might in the future so damage and destroy said portion of said Columbia River Highway, and that the

said portion of said highway set out in said order was in first class condition and repair, as well as the other said portions of said highway as set out hereinabove.

These plaintiffs have been informed and believe the fact to be and upon such information and belief charge that the said defendants have issued a blanket order covering approximately Fourteen other Federal aided highways, or portions of the same endeavoring to limit the said gross, maximum weight of 22,000 pounds to 16,500 pounds, and that such highways or portions of the same are in competition with railroad companies who have constructed and are operating freight lines over rails.

These plaintiffs have been informed and believe the fact to be and upon such information and belief charge that the entire cost last year of the maintenance and repair of said portion of said highway covered by said order do not exceed the sum of \$5,000.00.

That these plaintiffs are willing and able to and will indemnify the said State Highway Commission, defendants herein, by furnishing a good and sufficient bond to pay all damages which they may cause to the highway by reason of their motor trucks while carrying the said gross weight of 22,000 pounds for truck and load, as provided for in the said State law.

VI

That the said defendants; the State Highway Commission, actions under the provisions of the said sections of said above mentioned laws of the State of Oregon are arbitrary and unreasonable and are not based upon any hearing in regard to the true facts purported to exist in the said order and are contrary to true facts; that such order [fol. 14] discriminates against these plaintiffs and destroys their business and property, as well as prevents the public from enjoying the benefits derived from the said operation of said motor trucks at the rates for carriage which are now reasonable and just; that such order effects and burdens interstate commerce; that such order as entered is contrary to and in contravention of the "Federal Highway Act" and the Constitution of the United States, especially the 14th Amendment thereof; that such order de-

stroys competition; that such order enables the owners of private automobiles, motor busses and motor trucks of small capacity to monopolize and use the said Federal aided highway contrary to and in defiance of the said "Federal Highway Act" and the Contract entered into with the said State of Oregon.

VII

That these plaintiffs, as well as all other members of the said Auto Freight Transportation Association of Oregon and Washington, pray the protection of the Constitution of the United States, especially the Commerce Clause thereof and the 14th Amendment thereof, as well as of the contract entered into between the said State of Oregon and the Federal Government, as set out hereinabove, and as well as the provisions of the said "Federal Highway Act," against the said illegal acts of the said defendants, the State Highway Commission, acting under the provisions of the said sections 35 and 36 of the said laws of 1921 and section 36-A of the law of 1923, as well as the said provisions of said law of 1921, on the ground and for the reason that the same are contrary to and in contravention of the Constitution of the United States, especially the Commerce Clause thereof and the 14th Amendment thereof, as well as of the contract entered into between the said State of Oregon and the Federal Government, and as well as the provisions of the said "Federal Highway Act."

VIII

That unless these plaintiffs, as well as other members of [fol. 15] the said Auto Freight Transportation Association of Oregon and Washington, are given protection by injunction, they will be arrested daily in the conduct of their business, if their motor trucks exceed the said gross weight of 16,500 pounds and will be forced and compelled, either to discontinue their business or to reduce the said gross weight, as fixed by the law, at 22,000 pounds, to the gross weight of 16,500 pounds, as set out in said order issued by said defendants, all of which would deprive these plaintiffs of their rights to engage in their said operation of their said motor trucks carrying freight for compensation on the

said Federal aided highway as well as preventing interstate commerce and would destroy the use of their said motor trucks on said portion of said Columbia River Highway for which privilege the said plaintiffs have paid charges, including said registration and license fees, as aforesaid, and the premises considered these plaintiffs will sustain large, heavy, irreparable loss, damage and injury, and these plaintiffs have no plain, speedy and adequate remedy at law.

IX

That the matters involved in this controversy exceed in value the sum of Three Thousand (\$3,000.00) dollars exclusive of interest and costs.

X

For as much as the plaintiffs can have no adequate relief except in this Court, and to the end, that the defendants may, if they can, show why the plaintiffs should not have relief herein prayed, and make full disclosure and discovery of all the matters aforesaid, according to the best and utmost of their knowledge, remembrance, information and belief, full, true, direct and perfect answer make to the matters in this amended bill of complaint hereinbefore stated, but not under oath, an answer under oath being especially waived, the plaintiffs pray that a temporary injunction be granted, restraining the defendants and all [fol. 16] other officers and agents of the State of Oregon, from arresting or threatening to arrest or otherwise preventing, hindering or obstructing the said plaintiffs and all other members of the said Auto Freight Transportation Association of Oregon and Washington, while engaged in operating motor trucks over said portion of the said Columbia River Highway from the East County line of Multnomah County to Hood River, upon the ground and for the reason that the said plaintiffs, as well as other members of the Auto Freight Transportation Association of Oregon and Washington, are operating their said motor trucks when the gross weight thereof exceed 16,500 pounds, but not to exceed the gross weight of 22,000 pounds; that as the constitutionality of a State Statute and the enforce-

ment thereof by the defendants is sought to be enjoined, the plaintiffs prays that the Court proceed to call in Two other Judges of this Court, One of whom to be a Circuit Judge, for the purpose of hearing and determining the application of the temporary injunction as prayed for herein; and that upon the final hearing of this suit, the said Order of said defendants issued on August 28, 1925, limiting the gross weight of motor trucks on that portion of said Columbia River Highway, from the East County line of Multnomah County to Hood River, to 16,500 pounds, as well as the provisions of said law of Oregon of 1921, relating to the powers and authority of the State Highway Commission to limit the gross weight of motor vehicles, including their load, below 22,000 pounds, be declared void and unconstitutional and such interlocutory injunction be made permanent, and plaintiffs pray for such other, further and proper relief as may be just and equitable in the premises, including their costs and disbursements expended herein.

W. R. Crawford, Solicitor for Plaintiffs.

Post-office address: 325 Lumber Exchange Bldg., Seattle, Washington.

[fol. 17] *Duly sworn to by H. M. Hewett. Jurat omitted in printing.*

[fol. 18] EXHIBIT "A" TO AMENDED BILL OF COMPLAINT

OREGON STATE HIGHWAY COMMISSION

Order Reducing Maximum Load Limits on the Columbia River Highway Between Multnomah County Line and Hood River

Whereas the Columbia River Highway between the east boundary of Multnomah County and the west limits of the city of Hood River has been designated and declared to and is a state highway and has been improved and is being maintained by the State Highway Commission pursuant to the laws of the State of Oregon as a state highway, and

Whereas the above state highway in the judgment of the State Highway Commission is being subjected to a kind

and character of traffic which is damaging and injuring said highway and in order to protect said highway against such damage and injury, it is deemed and is the judgment of the Highway Commission and said Commission finds that it will be for the best interests of said highway that the maximum weight now permitted and authorized by law be reduced:

And whereas the State Highway Commission has after due investigation determined and found, and it is the judgment of the Commission, that the maximum weight shall be permitted upon the said road shall be reduced and fixed as in this order provided.

Now, therefore, the premises being in part as above stated, and the State Highway Commission having as a result of due investigation and does find that said road is being damaged and injured on account of the kind and character of traffic now being hauled over and upon said road, and by reason of the fact that loads of the maximum weight moved at the maximum speed specified by the provisions of the laws of the State of Oregon are breaking up, damaging and deteriorating the said road, and the Commission having found and does find upon due investigation that it will be for the best interests of the said state highway that the maximum weight of loads permitted upon said roads shall be reduced from 22,000 pounds to 16,500 pounds, and that the maximum weight of 600 pounds per inch for tires having a width in excess of 30 inches shall be reduced to 450 pounds per inch of tire width, and that the maximum allowable load for tires having a width of less than 30 inches shall be reduced to 500 pounds per inch width of tire to 375 pounds per inch width of tires.

It is hereby ordered that the maximum width of combined load and vehicle which shall be permitted upon said road shall not exceed 16,500 pounds, and that on any vehicle having a total tire width of less than 30 inches the concentrated weight in pounds bearing on the surface of the highway at contact with the tread of the two wheels of any one axle of such vehicle shall not exceed the product of the sum of the tire width of the two wheels of such axle, multiplied by 375 pounds; and on any vehicle having a total tire width of 30 inches or more than 30 inches the concentrated weight in pounds bearing on the surface of the highway at

contact with the tread of the two wheels of any one axle of such vehicle shall not exceed the product of the sum of the tire widths of the two wheels of such axle multiplied by 450 pounds.

It is further ordered that these rules and regulations as made and found by the State Highway Commission under the provisions of Chapter 371 of the laws of Oregon for 1921, as amended by Chapter 8 of the General laws of Oregon, 1921 Special Session, shall be in full force and effect from and after October 1, 1925 until revoked or modified by the State Highway Commission.

And it is further ordered that a notice be posted in a conspicuous manner and place- at each end of said highway, and at every cross-roads, so that said notice can be readily seen and read, which notice shall state plainly the limitations and prohibitions of traffic hereby in this order determined and fixed.

And be it further ordered that a certified copy of this order be furnished to the county clerk of Hood River County, and that a certified copy of said order be furnished the Secretary of State for the information of the Chief of the Traffic Enforcement Division.

Dated this twenty-eighth day of August, 1925.

Oregon State Highway Commission, by Wm. Duby,
[fols. 19-22] Chairman. H. B. Van Duzer, Com-
missioner. W. H. Malone, Commissioner.

Attest: Roy A. Klein, State Highway Engineer and Secretary.

[File endorsement omitted.]

[fols. 23 & 24] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed January 29, 1926

Comes now the defendants and move the court for an order dismissing the plaintiffs' bill of complaint on the ground and for the reason that said bill of complaint does

not state facts sufficient to constitute a cause of suit against the defendants or to entitle plaintiffs to the relief demanded.

I. H. Van Winkle, Attorney-General; J. M. Devers,
Asst. Attorney-General, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 25] IN UNITED STATES DISTRICT COURT

Before Gilbert, Circuit Judge, and Wolverton and Bean,
District Judges

W. R. Crawford, Seattle, Washington, for Plaintiffs.

I. H. Van Winkle, Attorney General, and J. M. Devers,
Assistant Attorney General, Attorney for Highway Com-
mission, for Defendants.

OPINION—Filed January 11, 1926

WOLVERTON, District Judge:

This is a suit on the part of owners and operators of motor trucks against the State Highway Commission, to enjoin it from enforcing an order made and promulgated August 28, 1925, whereby, until revoked or modified, motor trucks with a maximum weight of combined load and vehicle exceeding 16,500 pounds are inhibited the use of the highway. The highway involved extends from the east boundary of Multnomah County to the west limits of the City of Hood River, a distance of 22.11 miles, and is a part of what is known as the Columbia River highway extending from Portland to The Dalles, Oregon, which is a rural post road. Plaintiffs have complied with all the rules and regulations respecting the operation of motor trucks upon the highway, and were, prior to the date of such order, privileged so to operate, and to carry a combined maximum load not exceeding 22,000 pounds. They complain that the Highway Commission has reduced the maximum carrying capacity of their trucks per load to 16,500 pounds, thus invading their lawful and constitutional rights and privileges.

The case came up on an order to show cause why a preliminary injunction should not issue restraining defendant [fol. 26] from enforcing its order.

A motion to dismiss was interposed to the complaint by the defendant, and submitted at the same time.

In order to arrive at the legal and constitutional questions involved, it is necessary to give a brief statement of certain enactments of Congress and the Legislative Assembly of the State of Oregon.

By an Act of Congress of July 11, 1916 (c. 241, 39 Stat. 355), as amended February 28, 1919 (c. 69, 40 Stat. 1189, 1200), and the Federal Highway Act of November 9, 1921 (c. 119, 42 Stat. 212), the Secretary of Agriculture is authorized to co-operate with the states, through their respective highway departments, in the construction of rural post roads; but it is provided that no money appropriated under the act to any state shall be expended therein until its legislature shall have assented to the provisions of such act. It is further provided that the Secretary of Agriculture and the State Highway Department of each state shall agree upon the roads to be constructed therein and the character and method of construction.

Under the primary act, it is required (by its section 6) that the construction work and labor in each state shall be done in accordance with its laws, and under the direct supervision of the State Highway Department, subject to the inspection and approval of the Secretary of Agriculture, and in accordance with the rules and regulations made pursuant to the act. Under its section 7, the duty is imposed upon the states to maintain the roads so constructed according to the laws of the several states. Under the amendatory act (by its section 12) the construction and reconstruction work and labor in each state shall be done in accordance with its laws and under the direct supervision of the State Highway Department. And by its section 14, it is provided that, in case of failure of the state to maintain any highway within its boundaries after construction or reconstruction, the Secretary of Agriculture is authorized, on giving a prescribed notice, to proceed immediately to have the highway placed in proper condition of maintenance [fol. 27] at the charge and cost of the Federal funds allotted

to such state, and thenceforth to refuse to approve any other project in such state except as further provided in the act.

The state has, by due and proper enactment of its Legislative Assembly, accepted the provisions of the acts of Congress as required thereby. The State Highway Commission is the body duly authorized and empowered by the Legislative Assembly to act for the state in devising its policy, scheme and plan of highways within the state, to co-operate with the Secretary of Agriculture in approving the plans and specifications of highways to be laid and constructed, and to construct and maintain all rural post roads within the state. See Section 5 of an act "to provide a general system of construction, improvement and repair of State Highways and for the administration and operation thereof," etc. (c. 237, General Laws of Oregon 1917), and amendment thereto (c. 126, General Laws of Oregon 1919). By these enactments, the good faith of the state is further pledged "to maintain such roads and to make adequate provisions for carrying out such maintenance, and other Acts of Congress for similar purposes."

As early as 1917, it was enacted that no motor truck of over five tons capacity should be driven or operated upon any road or highway of the state, except upon permit of the county court of the county wherein such truck was sought to be driven. General Laws of Oregon, 1917, p. 268. In 1919, the provision was re-enacted that no motor truck of over five tons rated maximum load carrying capacity should be operated or driven over or upon any road or highway of the state. General Laws of Oregon, 1919, p. 719. In 1921 the Legislative Assembly adopted an act, its general purport being to regulate the use, regulation, conduct and operation of vehicles within the state. Herein it was enacted that no motor vehicle, motor truck, device or thing having a confined weight in excess of 22,000 pounds at the point of contact of the four wheels shall be moved over or upon any [fol. 28] highway without the written consent of the commission. C. 371, General Laws of Oregon 1921, p. 732. By the same act (section 36) the Highway Commission was authorized and empowered, whenever in its judgment it was deemed to the best interest of the state and for protection from undue damage of any highway or any section or sections thereof, to reduce the maximum weights and speeds in the act provided for vehicles moving upon such high-

way, and at the same time to fix the reduced weights and speeds. This section was amended at the special session of the legislature in December, 1921, and again at its 1923 session (General Laws of Oregon 1923, P. 204), but in no way do the amendments curtail the authority of the Highway Commission as above indicated.

It is not questioned that the section of the Columbia River Highway concerned in the present controversy is a rural post road within the purview of the Federal statutes applicable, and it can hardly be disputed that the State Highway Commission exercises, by delegation from the state, police powers in so far as it pertains to the maintenance of the state highways in proper condition and repair for the protection and general welfare of the public. *Hendrick v. Maryland*, 235 U. S. 610, 622.

It is the chief contention of counsel for plaintiffs that the Federal enactments by which aid by the General Government was extended to the several states for the construction and maintenance of highways within the states, and the acceptance thereof by the State of Oregon as required by Congress, constitute a contract which the state is bound to observe, and from which it cannot withdraw, and that such contract is one which inures to the benefit of the users of the highways, and which they are at liberty to invoke for the protection of their respective rights and privileges. Whether such correlative legislation can be termed a contract or not, it does constitute a legal status from which the state can neither withdraw nor alter, modify or qualify, without the consent or co-operation of Congress, and individuals, when their rights and privileges depending upon such joint and concurrent legislation, are trespassed upon, [fol. 29] undoubtedly are entitled to have their relief in a proper forum.

But it may be justly questioned whether the action of the Legislature of the State fixing, as it did in 1921, the maximum load weight of trucks used upon the highway at 22,000 pounds, is or constituted a part of that concurrent legislation. We are persuaded that it does not. The statute (being c. 371, General Laws of Oregon 1921), was enacted, as its title signifies, "for regulating the use, registration, licensing, taxing, identification, conduct and operation of vehicles and bicycles in the State of Oregon, and for

the protection of same; * * * providing for punishment for violation of this act; prohibiting the unauthorized use or possession of a vehicle," etc., and the matter respecting the maximum load weight to be carried by trucks is plainly germane to the subject embraced by the title. It does not relate to any matter within the purview of the joint and concurrent legislation of Congress and the state respecting the construction and maintenance of rural post roads.

There is no constitutional or legal reason why the State Legislature might not at the time have made the maximum truckload less than 22,000 pounds, so that it did not make it so low as practically to rule trucks off the highway, which would raise a legislative question involving discretion touching the reasonableness of the provisions of the act.

The legislature having this power, it also had the power to delegate to the State Highway Commission the authority in cases of emergency to reduce the carrying weight of trucks until the emergency was relieved against. This is all the commission attempted and is attempting to do in the present case. The order of the commission is temporary, not permanent, it is being "until revoked or modified."

The construction and reconstruction of the highways is required to be undertaken, and the work and labor in each state to be done, in accordance with its laws, and under the direct supervision of its highway department, and it is [fols. 30 & 31] made the duty of the states to maintain the roads constructed according to their respective laws; but should the state fail to properly maintain any highway within its boundaries, the Secretary of Agriculture is authorized, upon giving proper notice, to proceed immediately to place the same in proper condition. This is a burden imposed upon the General Government, and users of the highway have no right or authority to compel the repairs. The Government itself will come to their relief if exigency requires. Economically, highways, if falling into decay or disorder, should be protected until repaired or reconstructed, and the act of the State Legislative Assembly of 1921 recognizes this principle.

Another objection is interposed to the order of the Highway Commission, which is that it was issued without notice to the plaintiffs. This objection is without merit. The

public is not entitled to notice of the commission's intention as respects every move it purposes making for the protection of the highway.

Plaintiffs further complain that the commission has failed to keep the highway in proper repair, and that its default in this respect is what has necessitated the order complained of; but that, as we have seen, is a matter for the General Government, and not for the public.

In view of these considerations, it must follow that plaintiffs are not entitled to the preliminary restraining order as prayed, and from what has been said it is also apparent that the motion to dismiss should be sustained.

Let orders be entered accordingly.

[File endorsement omitted.]

[fol. 32] IN UNITED STATES DISTRICT COURT

OPINION ON MOTIONS FOR PRELIMINARY INJUNCTION AND TO
DISMISS—Filed March 15, 1926

BEAN, District Judge:

After the motion for a preliminary injunction had been denied, plaintiffs, by permission of the court, filed an amended bill, which is substantially the same as the original with the added averments that the highway in question has been permanently constructed; that the plaintiffs are engaged in traffic over it; that they are and have been delivering freight at their termini, Portland and The Dalles (both in this state), to motor trucks for carriage in and out of the state as a continuous service; that the order of the Commission limiting the weight of load and vehicle makes it impossible for them to compete with the railroad which parallels the highway.

The effect of the Federal and State Highway legislation is considered in the opinion heretofore filed, and we are not disposed to depart from or modify the views therein expressed. In our opinion, the added averments do not entitle the plaintiffs to the relief asked. The state has paramount control over the use of the highways within its

border, and it may enact and enforce reasonable regulations governing the traffic over them, necessary to secure their preservation and maintenance, and the public safety (13 R. E. L. Sec. 212; *Grand Trunk Western Ry. v. South Bend*, 227 U. S. 544). The highways of the state are, of course, open to intrastate and interstate commerce alike, and the state cannot, under the guise of legislation deny one engaged in interstate commerce the use of its highways (*Buck v. Kuykendall*, 267 U. S. 307). But in the absence of national legislation covering the subject, the [fols. 33 & 34] state may rightfully prescribe uniform regulation- adapted to promote safety upon its highways and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens (*Hendrick v. Maryland*, 235 U. S. 610; *Kane v. New Jersey*, 242 U. S. 160). If the state is impotent to protect its highways from destruction by excessively loaded trucks because, forsooth, they may be carrying interstate freight, it is difficult to understand how its right to regulate the speed or movement of such vehicles, or others carrying interstate passengers, can be supported.

The order of the Highway Commission complained of is not a discrimination against those engaged in interstate carriage or denying them the equal protection of the law. On the contrary, it puts all carriers by trucks on an equality.

The application for preliminary injunction is therefore denied, and in view of the provisions of Section 266 of the Judicial Code, as amended in February, 1925, the motion to dismiss the complaint will be sustained.

[File endorsement omitted.]

[fols. 35 & 36] IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION FOR TEMPORARY RESTRAINING
ORDER—Filed March 20, 1926

This matter comes to be heard at this time upon the application of the plaintiffs for a temporary restraining order restraining the above named defendants from enforce-

ing an order made by the Oregon State Highway Commission, which said order was dated August 28, 1925, and was made under the provisions of Chapter 371, General Laws of Oregon, 1921, which said order and statute are particularly set out and referred to in the bill of complaint filed by the plaintiffs; the plaintiffs appearing by W. R. Crawford, and the defendants appearing by J. M. Devers; said application having been heard by the Honorable William B. Gilbert, Judge of the U. S. Circuit Court of Appeals for the Ninth District, and Honorable Charles E. Wolverton and Robert S. Bean, Judges of the District Court of the United States for the District of Oregon; and the court having heard the argument of the counsel, and having filed its opinion herein, and now being fully advised, it is, therefore, ordered that said application for a temporary restraining order be, and the same is hereby denied.

Dated this 20th day of March, 1926.

Chas. E. Wolverton, Judge.

[File endorsement omitted.]

[fols. 37 & 38] IN UNITED STATES DISTRICT COURT

JUDGMENT—Filed March 20, 1926

This matter coming on to be heard at this time upon the motion of the defendants for an order dismissing plaintiff's amended bill of complaint herein on the ground and for the reason that said amended bill of complaint does not state facts sufficient to constitute a cause of suit against the defendants or to entitle them to the relief demanded; the plaintiffs appearing by W. R. Crawford and the defendants appearing by J. M. Devers, Assistant Attorney General, and the Court having heard the argument of counsel, and having filed its opinion directing that said motion to dismiss the amended bill of complaint herein be allowed, and now being fully advised,

It is hereby ordered that the defendants' motion to dismiss plaintiff's amended bill of complaint herein be, and the same is hereby, allowed; and plaintiffs having refused to plead further the said cause is hereby dismissed.

It is further ordered that defendants to have and recover of and from the plaintiffs their costs and disbursements herein, taxed in the sum of \$30.00, and that execution issue therefor.

Dated this 20th day of March, 1926.

Chas. E. Wolverton, Judge.

[File endorsement omitted.]

[fols. 39 & 40] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed March 20, 1926

This cause coming on to be heard upon the application of the Plaintiffs in the above entitled cause for the fixing of the amount of bond on appeal to the Supreme Court of the United States and the plaintiffs having this day given notice of appeal in open Court and the Court having heard the suggestions of the respective counsel of the parties hereto and being fully advised in the premises,

It is ordered, adjudged and decreed that the amount of such appeal bond be and it is hereby fixed at \$500.00 dollars, and further,

It is ordered, adjudged and decreed that said appeal prayed for by the plaintiffs be and it is hereby allowed upon the filing of a proper bond as provided for by law in the sum of \$500.00 dollars and approved by the Court.

Dated this 20 day of March, 1926.

Chas. E. Wolverton, Judge.

[File endorsement omitted.]

[fol. 41] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed March 20, 1926

And now, on this 20th day of March, A. D., 1926, came the plaintiffs by their solicitor W. R. Crawford, and say that the order entered in the above cause on the 20th day of

March, A. D. 1926, denying the application for a temporary or interlocutory injunction against the defendants herein, is erroneous and unjust to plaintiffs:

Because the Court erred in refusing and denying the application by plaintiffs for a temporary or interlocutory injunction against Wm. Duby, H. B. Van Duzer and W. H. Malone, the defendants herein.

And further, and now, on this 20th day of March, A. D., 1926, came the plaintiffs by their solicitor W. R. Crawford, and say that the order entered in the above cause on the 20th day of March A. D., 1926, granting the motion to dismiss the amended complaint in such cause and dismissing the said amended complaint, is erroneous and unjust to plaintiffs:

First. Because the Court erred in granting the said motion to dismiss the said amended complaint, and,

Second. Because the Court erred in dismissing the amended bill of complaint.

Third. Because the Court erred in dismissing the cause upon refusal of the plaintiffs to further plead after the amended complaint had been dismissed.

Wherefore the plaintiffs pray that the said order refusing the said interlocutory or temporary injunction be reversed, and further that the said decree entered in such cause be reversed, and the District Court be instructed to enter proper order or decree granting said interlocutory or [fols. 42-50] temporary injunction, and further that the District Court be instructed to enter such decree as prayed for by said amended bill of complaint, or for such proper relief as the plaintiffs are entitled to and as the nature of the cause demands.

W. R. Crawford, Solicitor for Plaintiffs.

[File endorsement omitted.]

[fol. 51] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION
BY APPELLANTS OF PARTS OF THE RECORD TO BE PRINTED
WITH PROOF OF SERVICE—Filed May 13, 1925

I

That the lower Court erred in denying the application for a temporary injunction.

II

That the lower Court erred in dismissing the amended bill of complaint.

III

That the lower Court erred in dismissing the cause of action.

IV

That the Rural Post Act of 1916, as amended by the Federal Highway Act of 1921 were adopted by the State of Oregon in 1917 and in subsequent years thereafter, and by such adoption the said provisions of said Federal Acts became contracts and could not be constitutionally voided by any subsequent legislative act by the State of Oregon.

V.

• That said Federal Highway Acts, so adopted by said State, compelled the system of Federal aided highways in said State to be constructed and reconstructed in a permanent manner so as to furnish sufficient strength and width to take care of the then traffic and also probable future traffic.

VI

That said Federal aided highways were aided by the Federal Government in an amount of more than \$13,000,000.00, and such highways were built and reconstructed in a permanent manner, including that portion of the Columbia River Highway between the East Line of Multnomah County and Hood River City, Oregon.

VII

That said portion of said Columbia River Highway afore-said, as well as the remaining portion of said Columbia River Highway is in first class condition and has in no way [fol. 52] been damaged or destroyed, nor is it in danger of being damaged or destroyed by the operation of the motor trucks of the above appellants, carrying the legal maximum weight of trucks and loads of 22,000 pounds.

VIII

That the Appellants had been operating, their trucks under the sanction of the gross maximum weight which had been fixed and established prior to the adoption of the said Federal Highway Acts, and the same legal gross maximum weight is still in force, to-wit, 22,000 pounds for truck and load.

IX

That the Appellants had prior to October 1, 1925, purchased motor trucks for the sole purpose of carrying the capacity loads within the said gross maximum weight as so fixed by the said law and said Federal Highway Acts. That Appellants were compelled to and did pay license fees for such capacity trucks, being largely in excess required of trucks of smaller capacity and also were compelled to pay and did pay the exaction on the width of tires as required by law, in order to operate such capacity trucks, which charge is largely in excess of trucks of smaller capacity. That the Appellant Morris is now and has been operating the maximum capacity trucks for more than Four and one-half years prior to said October, 1925, and the other Appellants have been operation their trucks with maximum capacity for various periods prior to said October 1, 1925.

X

That the said order made by said Appellees reducing the said legal gross maximum weight of truck and load from 22,000 pounds to 16,500 pounds, was made without any notice or hearing, not only to the Appellants but all other persons. That such order was arbitrary and unrea-

sonable and was not warranted by either the facts or the law, and destroyed and damaged the rights and privileges vested in the said Appellants to operate their said trucks with the said legal gross weight of truck and load, to-wit, 22,000 pounds.

XI

That said order affects the following portion of the Columbia River Highway, Federal aided and interstate in character, between the East Line of Multnomah County and Hood River City, a distance of 22 miles, by changing the [fol. 53] said statutory gross maximum weight to 16,500 pounds, without any warrant of fact or law, as the said Appellees were not vested with any jurisdiction or power to reduce such gross maximum load provision, but such action was contrary to and in violation of the provisions of the said Federal Highway Acts as adopted by said State, especially in requiring all Federal aided highways to be constructed and reconstructed in a permanent manner in order to take care of the then traffic and also probable future traffic, by constructing and reconstructing such highways with sufficient strength and width. That the said portion of said Columbia River Highway affected by said order had been constructed and reconstructed during the years 1920 and 1923, and that said highway between Portland and The Dalles, including said portion affected by said order, was in first class condition and repair and had never been damaged, injured or destroyed by the operation of Appellants' motor trucks carrying a gross maximum weight of truck and load of 22,000 pounds and that the same is in no danger of being damaged, injured or destroyed by the operation as aforesaid by said Appellants. The said portion affected by said order was constructed and reconstructed many years subsequent to that portion West of the East County Line of Multnomah County to Portland, which was constructed and reconstructed in the same manner and with the same material and in a permanent manner.

XII

Said order damages, injures and destroys the said operation of the said Appellants, in that for many years tariffs of rates had been filed with the Public Service Commission

as required by law, and such tariffs were just and reasonable, and were based upon the said statutory gross maximum weight of truck and load, and that it would be impossible for the Appellants to change such tariff and double the same as such additional charge would be unreasonable and unjust, and said Public Service Commission would not permit such additional charge, yet the said order decreases the legal capacity of said trucks so that the earning ability thereof would be cut in two and the legal charges would not be sufficient to pay for the operation of said trucks. The public would be injured and has already been injured [fol. 54] by such order.

XIII

That said order was issued wholly and solely in the interest of the railroad lines and the steamboat lines competing for the business of said motor trucks between Portland and The Dalles and beyond.

XIV

That the Appellants have been transporting interstate commerce between the State of Oregon and the State of Washington and such order not only burdens interstate commerce but has destroyed it.

XV

That the Appellants, as well as other owners of motor trucks operating in and out of Portland, Oregon, have secured a terminal for freight worth over \$250,000.00 and that such order has affected the earnings of said terminal.

XVI

Said order discriminates against these Appellants in favor of motor busses.

XVII

That the said order is in violation of and contrary to the Commerce Clause of the Constitution of the United States, and especially the 14th Amendment thereof, and also the

Federal Legislation, extending aid to the State of Oregon, adopted by the State of Oregon which constitutes a contract and the protection of which is sought by these appellants.

XVIII

That Appellants were entitled to the issuance of a temporary injunction, as the Appellees admit that the only cost of keeping said portion of said highway affected by said order amounted to about \$5,000.00, and Appellants offered to and were able and willing to secure all damage or injury, if any, by a good and sufficient bond so as to indemnify the State of Oregon for any damage or injury to such portion of said highway caused by the operation of Appellants' trucks carrying the gross maximum weight of trucks and loads of 22,000 pounds instead of said 16,500 pounds as set out in said order.

We contend that the said action of the lower Court in [fol. 55] refusing to grant said temporary injunction on application on the amended bill of complaint herein should be reversed, and further that the action of the lower Court in dismissing the amended bill of complaint should be reversed, and the action of the lower Court in dismissing the cause of action and for any other or proper relief as this Court may deem proper and fit in the premises.

W. R. Crawford, Edwin C. Ewing, Counsel for Appellants.

[fol. 56] STATE OF WASHINGTON,
County of King, ss:

F. B. Kliphouse being first duly sworn upon oath deposes and says: That he is a citizen of the United States, residing at Seattle, Washington, over the age of 21 years and is qualified to be a witness in the above entitled cause; that about Five (5:00) P. M. May 5, 1926, he mailed at the Post Office in the Federal Building at the corner of Third Avenue and Union Street, Seattle, Washington, a certain letter which was duly registered addressed to I. H. Van Winkle, Attorney General of the State of Oregon, at Salem, Oregon, in which letter was contained as an enclosure a copy of points relied upon by the Appellants in the above entitled

cause and also another enclosure entitled a statement of the parts of the record to be printed in the above entitled cause.

F. B. Kliphouse.

Subscribed and sworn to before me this 5th day of May, 1926. Morris B. Sachs, Notary Public in and for the State of Washington, Residing at Seattle. (Seal of Morris B. Sachs, Notary Public, State of Washington. Commission expires Jan. 2, 1928.)

[fol. 57] Parts of Record in the Above-entitled Cause
Hereby Designated to be Printed

1. Amended Bill of Complaint.
2. Order denying interlocutory or temporary injunction.
3. The Motion to dismiss the Amended Bill of Complaint.
4. The Order or Decree dismissing the Amended Bill of Complaint and dismissing the cause, on refusal to plead further.

5. Assignment of Errors.

6. Opinions of the Court.

7. Names of Attorneys and Addresses.

W. R. Crawford, Edwin C. Ewing, Solicitors for Appellants.

[fol. 58] [File endorsement omitted.]

Endorsed on cover: File No. 31,926. Oregon D. C. U. S. Term No. 372. R. B. Morris, doing business as Morris & Lowther; H. M. Hewitt, and Lew Nunamaker, etc., et al., appellants, v. Wm. Duby, H. B. Van Duzer, and W. H. Malone, etc. Filed May 13th, 1926. File No. 31,926.

(2119)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

NO.

R. B. MORRIS, doing business as Morris & Lowther; H. E. Hewitt and Lew Nunamaker, doing business as John Day Valley Freight Line; H. L. Livingston, doing business as Bend-Portland Transit; and Portland-Hood River Truck Line, Inc., *Appellants*,

v.

William Duby, H. B. Van Duzer and W. H. Malone, as the Oregon State Highway Commission, *Appellees*.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

PETITION FOR A STAY OR IN THE ALTERNATIVE FOR THE ADVANCEMENT OF THE CASE.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, R. B. Morris, doing business as Morris & Lowther; H. E. Hewitt and Lew

Nunamaker, doing business as John Day Valley Freight Line; H. L. Livingston, doing business as Bend-Portland Transit; and Portland-Hood River Truck Line, Inc., have been and are now owners and operators of motor trucks carrying freight and express as common carriers between Portland, Oregon, and The Dalles, Oregon, and points beyond on the Columbia River Highway, a Federal aided Highway, interstate in character, and said petitioners have been and are now carrying interstate commerce between the States of Oregon and Washington in connection with other carriers.

That the Appellees, constituting the State Highway Commission, issued a certain order to take effect on October 1, 1925, limiting the gross weight of trucks and loads to 16,500 pounds per truck.

That the Appellants herein instituted a certain action in the District Court of the United States for the District of Oregon, seeking to obtain a permanent injunction against the said State Highway Commission restraining it from limiting said gross weight as aforesaid, and prayed for a temporary injunction until final hearing and determination of said case. Such application was heard before the said District Court, consisting of Three Judges, one of whom was a Circuit Judge, all as provided for by the Judicial Code. That after such application had been denied, an amended bill of complaint was filed, after consent of said Court was obtained. A new

application for a temporary injunction was presented and heard by the said District Court, consisting of the same Three Judges, and the said application on said amended complaint was denied and at the same time the said Court, consisting of said Three Judges, ordered the motion to dismiss which had been presented in said cause on said amended bill of complaint, to be granted, and upon failure and refusal to amend further the cause itself was ordered dismissed and a final decree entered in accordance with such order.

The ground upon which said District Court denied the application for a temporary injunction upon said amended bill of complaint and dismissing such cause was generally that the State Highway Commission was vested with the authority and jurisdiction to fix limitations of the gross weight of trucks and loads, irrespective of the statutory limitations of the maximum of gross weight of trucks and loads. That from such decree denying said application for a temporary injunction based upon said amended bill of complaint and the final decree dismissing said cause, the petitioners duly appealed to this Court, and such cause is now docketed herein. These petitioners present the following grounds in support of such appeal:

1. That the allegations of the amended bill of complaint upon which said temporary injunction was asked were all admitted to be

true by the motion to dismiss, as no other defense was made.

2. The order made by the said State Highway Commission diminished the gross maximum load fixed by law at 22,000 pounds to 16,500 pounds gross weight of truck and load. That such order only relates to a distance of approximately 22 miles between the East line of Multnomah County and Hood River City, but does not effect the said Columbia River Highway, a Federal aided highway, interstate in character, situated between Astoria, via Portland, through Hood River City, The Dalles to the Idaho State Line.
3. That the petitioner Morris has been operating his trucks for more than four and one-half years from Portland on said Columbia River Highway through the portion effected by said order to The Dalles, and the other petitioners have been so operating prior to said order for various periods. That said petitioners, long prior to said October 1, 1925, purchased trucks weighing from 11,500 pounds to 12,500 pounds in order to carry the capacity loads as fixed by the State. Petitioners were compelled to and have paid the highest license fees on their capacity trucks and the highest charge for the width of tires required by the law for such capacity trucks.
4. Petitioners were required to file with the Public Service Commission schedules of operation and tariffs and have done so. That such schedules so filed have been adopted by the said Public Service Commission of the State

as just and reasonable, and without action of the said Public Service Commission the said tariffs can not be increased, and the said Public Service Commission has informed the said petitioners that the said tariffs will not be permitted to be increased. That the petitioners adopted such tariffs based upon the said capacity loads of said trucks, to-wit, a gross maximum of load and truck of 22,000 pounds per truck, and that such order decreasing the said gross maximum to 16,500 pounds for such 22 miles would damage and destroy their business, as the load capacity would be decreased more than one-half, and necessarily would effect the said published tariffs and would destroy the business of these petitioners.

5. It is admitted that such action of said State Highway Commission was made without any notice to these petitioners or any one else, and that such action was arbitrary and unreasonable and that the said portion of said Columbia River Highway had been built many years prior to the said portion of said highway from the said East Line of Multnomah County to Portland, Oregon, and that that portion of the said highway from Hood River City to The Dalles had been constructed at the same time as that portion between Hood River City and the East line of Multnomah County. That the said portion of said highway affected by said order was built prior to 1920 and has been reconstructed and widened by the aid granted by the Federal Government under the Rural Post Road Act of 1916, as amended by the "Federal Highway Act"

of 1921. That said portion affected is in perfect condition and repair and is not being in any way damaged or destroyed by the operation of petitioners' trucks and such operation of said petitioners' trucks would not in the future damage such portion of said Federal aided highway. That these petitioners only operate nine trucks of such capacity between Portland, through the affected portions to The Dalles and beyond. That steamboat lines and railroad lines are parallel to the said portion affected by said order, and the operation of the petitioners' trucks furnishing adequate facilities to the public at a reasonable price have impaired the freight earnings of said steamboat lines and said railroad lines, and said order was made in the interest of said steamboat lines and said railroad lines and to destroy competition by motor trucks. The said State Highway Commission promulgated another order diminishing the legal gross maximum weight of truck and load of 22,000 pounds to 16,500 pounds, which affects the entire system of Federal aided highways in said State by affecting portions of 14 Federal aided highways in the same manner as the Columbia River Highway, and all said portions of said 14 other Federal aided highways are parallel to railroad lines.

6. That the property of petitioners was taken without due process of law, as they had paid for the privilege of operating maximum gross weight on such affected portions of said Columbia River Highway, and their business would be destroyed and irreparably damaged

by compelling their freight to be rehandled at either the East line of Multnomah County or Hood River City, and additional equipment to be purchased and used for such 22 miles, and further said freight rates so changed and modified without a hearing and without any notice, and that the petitioners as well as others operating out of Portland have had constructed a freight terminal at Portland at a cost of over \$250,000.00 in order to handle freight in and out of Portland, and at such terminal many hundreds of tons of freight are handled and the said results of said orders will bankrupt and destroy said terminal, as well as these petitioners and other owners and operators of motor trucks affected thereby.

7. That the State Highway Commission has never been vested with any authority or jurisdiction to fix any different gross weight maximum of truck and load, as enacted by the legislature, to-wit, 22,000 pounds. That the said order illegally diminishes the legal weight and is not based upon any emergency or condition of highway.
8. That said order was issued for the sole purpose of destroying competition.
9. That the petitioners are protected under the Federal aided highway legislation, namely, that the State of Oregon duly enacted a law adopting the said Rural Post Road Act, as amended by the Federal Highway Act, and did agree to construct and reconstruct highways to be aided by Federal moneys under a

plan approved by the Secretary of Agriculture of the United States, and that said State agreed to construct and reconstruct such Federal aided highways in a permanent manner, and with sufficient strength and width to take care of the then traffic as well as probable future traffic. That the State did construct and reconstruct said portion of said Columbia River Highway in a permanent manner by hard-surfacing the same in the same manner and with the same material as the adjacent portions of said Columbia River Highway, East of Hood River City and West of the Multnomah County East Line. That when said State adopted the said provisions of said Federal Acts, the State had fixed a gross weight of truck and load at 22,000 pounds and said gross maximum weight is now in full force and effect. That the State Highway Commission never had any authority to in any way change, modify or prohibit the said gross maximum weight provision at the time when the said Federal Acts were adopted by said State, and when the said petitioner Morris, as well as other operators of motor trucks, had engaged in business. It was not until the year 1921 that the State delegated authority to regulate the use of highways by the State Highway Commission, but only was a power vested in said State Highway Commission to regulate the use of said highways while the same were being reconstructed or repaired.

10. That the petitioners were and are protected under the said contract entered into between the Federal Government and the State of

Oregon, as aforesaid, and are entitled to operate their said motor trucks with a gross maximum weight of truck and load of 22,000 pounds, as said Columbia River Highway and the portion of the same affected by said order was constructed and reconstructed for the strength necessary to carry said gross maximum weight of 22,000 pounds for truck and load. That in the year 1920 when said portion of said Columbia River Highway affected hereby was constructed and was reconstructed in 1922 by widening the same, there were only four trucks with the maximum capacity, and since the year 1920 other trucks of the same capacity have been added from time to time until at the present time there are nine trucks of such legal capacity of 22,000 pounds. That since said years private automobiles have increased until a daily average of over 1,500 are now using such portion of said highway. Moreover, motor busses have increased in number and capacity so that there are now many more motor busses on such highway than said trucks with the maximum capacity. And that such motor busses weigh with bus and load 16,500 pounds, and have a speed of 30 miles per hour, while the trucks of the petitioners are restricted to the speed of 12 miles per hour. That such motor busses do not engage in interstate commerce but their entire operation is intrastate. That the said order discriminates against the operation of said trucks of petitioners in favor of said motor busses, and burdens interstate commerce as aforesaid.

11. That the said portion of said highway affected by said order has only cost for maintenance for one year last past the sum of approximately \$5,000.00, and that the petitioners offered to and were able to furnish a good and sufficient bond to indemnify the said State against any damage whatsoever that might accrue by operating petitioners' trucks with the said gross maximum load of truck and load of said 22,000 pounds, and are still ready, willing and able so to do.
12. That the petitioners are entitled to protection against the said infringement of their rights, as protected by the commerce clause of the Constitution of the United States, the 14th Amendment thereof and the contract entered into between the said Federal Government and the State of Oregon as aforesaid.

On the one hand the State would be protected by a good and sufficient bond to guarantee against damage by petitioners' trucks as aforesaid, while on the other hand the petitioners, if not protected by such stay order pending the determination of the appeal pending in this Court, will lose the moneys which they have paid for their increased license fees and the tire width charge, and also will be irreparably injured and damaged in their business which will be destroyed during the pendency of this appeal, and the public itself will not only lose the facilities furnished by said motor trucks, but also will be compelled to pay higher prices for the carrying of such freight, as now

carried by these petitioners, and competition will be destroyed.

Wherefore these petitioners herein, pray that an order be made, herein restraining, until the final determination by this Court of the appeal herein, the said William Doby, H. B. Van Duzer and W. H. Malone, as the Oregon State Highway Commission, appellees herein, their agents, servants and employees, from arresting or causing the arrest, or in any way interfering with or obstructing the appellants', their agents, servants, employees and drivers from operating motor trucks with a gross maximum weight of truck and load of 22,000 pounds, or for such order as may be proper, the premises considered, agreeable to the usages and practices of law.

W. R. CRAWFORD

EDWIN C. EWING

Counsel for Appellants.

STATE OF WASHINGTON.

County of King, ss:

W. R. Crawford, being first duly sworn, upon oath deposes and says: That he is one of the counsel for the Appellants in the above entitled cause, that he has read the foregoing petition for a stay and knows the contents thereof, and that the matters set out therein are true, except as to

the matters set out on information and belief, and as to such matters it is true as he verily believes.

W. R. CRAWFORD

Subscribed and sworn to before me this 5th day of May, 1926.

MORRIS B. SACHS,
*Notary Public in and for the State
of Washington, residing at Seattle.*

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1925

No.

R. B. MORRIS et al., *Appellants*,

v.

WILLIAM DUBY et al., *Appellees*.

On Appeal from the District Court of the United
States for the District of Oregon.

To HONORABLE I. H. VAN WINKLE
Attorney General of Oregon.

Sir:—

Please take notice that a petition for a stay or
in the alternative for the advancement of the case
in the above entitled cause, a copy of which is
handed you by registered mail, will be submitted
to the Supreme Court of the United States on
May 24, 1926.

W. R. CRAWFORD

EDWIN C. EWING

Counsel for Appellants.

IN THE SUPREME COURT OF THE
UNITED STATES
October Term, 1925.

No.

R. B. MORRIS et al., *Appellants*,

v.

WILLIAM DUBY et al., *Appellees*

AFFIDAVIT OF SERVICE

STATE OF WASHINGTON,

County of King, ss:

F. B. Kliphouse, being first duly sworn, upon oath deposes and says: That he is a citizen of the United States, residing at Seattle, Washington, over the age of 21 years, and is qualified to be a witness in the above entitled cause; that about five (5) o'clock P. M. May 5, 1926, mailed at the Post Office in the Federal Building at the corner of Third Avenue and Union Street, Seattle, Washington, a certain letter which was duly registered addressed to Honorable I. H. Van Winkle, Attorney General of the State of Oregon, at Salem, Oregon, in which letter was contained as an enclosure a copy of the petition for a stay or in the alternative the advancement of

the case, and an additional enclosure giving notice that said petition would be submitted to the Supreme Court of the United States on May 24, 1926.

F. B. KLIPHOUSE

Subscribed and sworn to before me this 5th day of May, 1926.

MORRIS B. SACHS,

*Notary Public, in and for the State
of Washington, residing at Seattle.*

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 12,111

L. S. Martine, M. C. Yahne, Fred Gordon, T. E. Scott, J. B. Farrell, George Bauer, O. S. Crowder, Walter Nelson, Robert E. Frazier, doing business as Portland-Hood River Truck Line; George V. Bishop, Henry Kunz, Nelson Kirkpatrick, doing business as Interstate Truck Service; G. P. Philley, L. Wallen, Wm. Jossy, J. W. Guyer, Morgan Brothers, by H. E. Morgan, A. H. Cramer, P. L. Wilkinson, doing business as Alert Transfer & Storage Co.; Robt. R. Bailey, Reddway Truck, Inc., John McDonald, Francis O. Farney, Shelley Bowen and Chas. O'Malley, *Appellants*,

v.

Sam A. Kozer, Secretary of State of Oregon,
Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON

PETITION FOR THE ADVANCEMENT OF
THE ABOVE-ENTITLED CASE

To the Honorable the Chief Justice and the Associated Justices of the Supreme Court of the United States:

Your Petitioners, the above named Appellants, show as follows: That, on December 23, 1925,

the Petitioners duly instituted an action in the District Court of the United States for the District of Oregon and the District Court sustained the motion to dismiss the amended bill of complaint, and also dismissed the cause upon refusal of the Petitioners to plead further. An appeal has been duly perfected to this Court from the said order and decree.

That the matters involved are as follows:

1. That the Rural Post Road Act was enacted in the year 1916 and was thereafter amended by the Federal Highway Act of 1921.
2. That the State did in 1917 duly enact a law adopting the provision of said Rural Post Road Act, as amended aforesaid in 1921. That since the adoption of said Federal Acts the State has received many millions of dollars under the provisions of said Federal Acts, so adopted by said State.
3. That said Federal Acts provided that: "That all highways constructed or reconstructed under the provisions of this act shall be free from tolls of all kinds."
4. That under the provisions of said Federal Acts a system of primary and secondary highways, which embrace practically all of the highways of said State, was duly adopted, and the Federal aid has been used by said State in the construction and reconstruction of such system of highways, and such aid is being now paid to the State.

5. That since the year 1921 the said State has enacted laws exacting fees for the use of motor vehicles operating on the highways, fees for the owners of such vehicles, fees for drivers of such motor vehicles, fees for dealers selling such motor vehicles, and fees based on the amount of motor liquid fuel used by said motor vehicles operating on such highways. Such exactions have become and are becoming unreasonable and unjust.
6. That the Registration fees involved herein are charged and collected only against the motor vehicles themselves, and the Appellee, under color of his office, has and will continue to enforce the provisions of the said State law and has and will compel all persons, firms and corporations, as well as the Petitioners, to pay such registration fees in advance of the use of such motor vehicles on said public highways. That the Petitioners, as well as all persons, firms and corporations similarly situated or interested, will use during the year 1926, and in the future years, their said motor vehicles on the said Federal-aided highways of said State, and they will be subject to arrest and heavy fines imposed, or imprisonments, or both, unless they pay such registration fees in advance of said use.
7. That all of the said moneys to be charged and collected for said registration fees for the calendar year of 1926, will aggregate not less than Four Million Dollars. Such registration fees vary from \$15.00 for the smallest car, up to over \$200.00 for the calendar year.

8. That all of such moneys to be so charged and collected will be used exclusively for the construction and reconstruction of the said Federal-aided highways, in addition to the moneys paid by the Federal Government under said Highway legislation. None of such money will be used to pay for the regulation or administration of the law, but all of the money to be charged and collected for owners,' driver's and dealers' fees are more than sufficient to cover all the costs of regulation and administration of such law, relating to the regulation of the use of public highways by motor vehicles. Such exaction is a "toll," being exclusively a charge for the benefits derived from the improvements so made.
9. The actions of the Appellee are and will be illegal, as being in contravention of the Constitution of the United States, especially the 14th Amendment thereof, and the Federal Highway Acts so adopted by the said State, the benefits of which the said State has and will continue to have.

Your Petitioners say further that the above case should be advanced and heard as speedily as possible for the following reasons, to-wit: That the Petitioners, as well as all others, will be compelled to pay such exorbitant and illegal exactions, or will suffer the penalties under said law. That the matter involved herein affects not only this State, but also all of the States of the Union, as such similar exactions are being made and millions of dollars are being now charged and collected as "tolls" for the use of motor vehicles on the Federal-aided highways of such States.

That there is now pending on appeal in this Court another case from the District of Oregon, entitled *Anthony et al., v. Koser*, numbered 1047 in the October Term, 1925, which involves the exaction of a charge on gasoline for the use of motor vehicles operated exclusively on public highways, the moneys so derived to be expended in the construction and reconstruction of the system of Federal-aided highways in said State, and the question is whether or not such exaction is prohibited by the provisions of said Federal Highway Acts, prohibiting the charging of "tolls."

Wherefore, the Petitioners pray this Court to advance the above entitled cause and for a speedy hearing and determination of the same, and further that the Court will order the consolidation for hearing of the above entitled cause with the said case of *Anthony et al., v. Koser*, No. 1047, of the October Term, 1925, and permission to be given to present such cases, if consolidated, by one brief covering such two cases.

W. R. CRAWFORD,

EDWIN C. EWING,

Counsel for Appellants.

ANTHONY et al., *Appellants*,

v.

KOZER, *Appellee*. No. 1047 October Term, 1925.

We, the Appellants in the above entitled cause numbered 1047 of the October Term, 1925, petition this Honorable Court for the advancement of such cause and for a consolidation with the said cause entitled *Martine et al., Appellants, v. Kozar, Appellee*, and for the privilege of presenting such consolidated causes in one brief, as questions are similar and based on the Federal Highway Acts and the adoption thereof by the State.

W. R. CRAWFORD,

EDWIN C. EWING,

Counsel for Appellants.

STATE OF WASHINGTON,

County of King, ss:

W. R. Crawford, being first duly sworn, upon oath deposes and says: That he is one of the counsel for the Appellants in both of the above entitled causes, that he has read the foregoing petitions for the advancement and the consolidation of said causes and knows the contents thereof, and that the matters set out therein are true, except as to the matters set out on information and belief, and as to such matters it is true as he verily believes.

W. R. CRAWFORD.

Subscribed and sworn to before me this 15th day of May, 1926.

MORRIS B. SACHS.

*Notary Public in and for the State
of Washington, residing in Seattle.*

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1925.

No. *12,000*

MARTINE et al., *Appellants*,

v.

KOZER, *Appellee*.

No. 1047 October Term, 1925.

ANTHONY et al., *Appellants*,

v.

KOZER, *Appellee*.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON

*To the Honorable I. H. Van Winkle, Attorney-
General of Oregon:*

Sir:

Please take notice that a petition for the advancement of the cases in the above entitled causes, a copy of which is handed you by registered mail, will be submitted to the Supreme Court of the United States on June 7, 1926.

W. R. CRAWFORD,
EDWIN C. EWING,
Counsel for Appellants.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1925.

No.

MARTINE et al., *Appellants*,

v.

KOZER, *Appellee*.

No. 1047 October Term, 1925.

ANTHONY et al., *Appellants*,

v.

KOZER, *Appellee*.

AFFIDAVIT OF SERVICE

STATE OF WASHINGTON,

County of King, ss:

F. B. Kliphouse, being first duly sworn, upon oath deposes and says: That he is a citizen of the United States, residing at Seattle, Washington, over the age of 21 years, and is qualified to be a witness in the above entitled causes; that about Five (5:00) o'clock P. M., May 15, 1926, he mailed at the Post Office in the Federal Build-

ing at the corner of Third Avenue and Union Street, Seattle, Washington, a certain letter which was duly registered, addressed to Honorable I. H. Van Winkle, Attorney-General of the State of Oregon, at Salem, Oregon, in which letter was contained as enclosure a copy of the Petition for the advancement of the above cases, and an additional enclosure giving notice that said Petition would be submitted to the Supreme Court of the United States on June 7, 1926.

F. B. KLIPHOUSE.

Subscribed and sworn to before me this 15th day of May, 1926.

MORRIS B. SACHS,

*Notary Public in and for the State
of Washington, residing at Seattle.*

FILE COPY

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U. S. DEPT. OF JUSTICE

Supreme Court of the United States

WINTER TERM, 1928

No. 372

R. B. MORRIS, DOING BUSINESS AS MORRIS
& LOWTHE, H. M. HEWITT AND LEW
SUNAMAKER, ETC., ET AL, APPELLANTS.

vs.

WM. DUBY, H. B. VAN DUZER, AND W. H.
MALONE, ETC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON.

BRIEF OF APPELLANTS

W. B. CRAWFORD,
EDWIN C. EWING,

Solicitors for Appellants.

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JURISDICTION OF THIS COURT

This action was instituted in the lower court in order to restrain the enforcement of certain provisions of a State law and the acts of the State Highway Commission thereunder in enforcing certain orders reducing the combined weight of trucks and loads and to test the constitutionality of said State law and the said acts of said Commission.

The plaintiffs prayed the protection of the Constitution of the United States, the Federal Legislation granting financial aid to the States in construction of rural post roads, and the contract entered into by the State which divested its jurisdiction over Federal aided highways and vested sole jurisdiction thereof in the Federal Government.

Under the provisions of Section 266, as amended, of the Judicial Code, the lower court, composed of three judges, heard the application for such temporary injunction, and on March 20, 1926, entered an order denying such application, and on same day entered a decree dismissing the amended bill of complaint and also the cause. (P. R. p. 25, 26).

The jurisdiction of this Court is invoked under Section 238, as amended, of the Judicial Code, on the grounds that the provisions of a State law, and the acts of the State Highway Commission thereunder, are in violation of the Constitution of the United States, the Federal Legislation relating to Federal aid highways, and the contract made by the State adopting and agreeing to abide by the provisions of the Federal Highway Act.

The protection of the Federal Constitution and Federal Legislation aiding rural post roads and the con-

tract by the State adopting same was invoked by plaintiffs.

Buck v. Kuykendall, 267 U. S. 307, 69 L. Ed. 623.

STATEMENT OF THE CASE

The plaintiffs instituted this action on behalf of themselves and all the other members of the Auto Freight Transportation Association of Oregon and Washington against the defendants, constituting the Oregon State Highway Commission. (P. R. 1.)

The plaintiff Morris is and has been operating trucks for more than four and one-half years last past carrying freight for compensation from Portland, Oregon, on the Columbia River Highway, to The Dalles, Oregon, and intermediate points, as a common carrier; the other named plaintiffs have and are now operating motor trucks as common carriers on the same highway between Portland, Oregon, to The Dalles and beyond. (P. R. 2.)

As provided by law the plaintiffs had applied for and were granted permits to operate their trucks as common carriers from Portland to The Dalles or beyond, and have paid all the fees required by said Commission in order to so use said trucks as common carriers. Moreover, the plaintiffs filed and adopted tariffs all as provided for in said law. Such tariffs fixed a reasonable, just and remunerative charge for freight carriage and were based upon the then capacity of said motor trucks. (P. R. 2.) That plaintiffs have no power to change such tariff rates without hearing before said Commission and such scheduled rates so filed could not be lowered without confiscating and destroying the property rights and business of the plaintiffs. (P. R. 3.) The plaintiffs were required to and did pay to the State the motor vehicle fees and all other fees so demanded, such fees were based upon, not only the capacity of said trucks, but also the width of the tires thereof; the plaintiffs were compelled to pay the highest fees in said State in or-

der to obtain the right to operate trucks for compensation in said State with the maximum capacity as fixed by the laws of said State, to-wit, 22,000 pounds gross weight of truck and load. (P. R. 3.) Plaintiffs carry freight on said motor trucks from divers points along said Columbia River Highway for delivery as a continuous service between the State of Oregon and other States; that such interstate service has been carried on for years and is constant and efficient and the public demand the continuance of the present rates and service, which service is one made along the highway at the door of the consignee without additional charge. (P. R. 3.) The plaintiffs and other members of said Association have leased and operate a terminal in Portland, Oregon, for the exclusive use of said plaintiffs and members of said Association. Such building was built for said Association at a cost of \$285,000.00 Such building occupies 40,000 square feet and is Four stories in heighth on portions of said property. The City of Portland compels all common carriers of freight to install a terminal of this character and such Association was compelled to have such building built and these plaintiffs and all members of said Association have been and are now compelled to share in the expenses of such terminal. Plaintiffs have increased the volume of their business and are now furnishing the public service which is demanded by Public Convenience and Necessity. (P. R. 3, 4.)

The defendants are the duly qualified and acting Oregon State Highway Commission. (P. R. 4.)

In 1916 Congress enacted the Rural Post Road Act. The State of Oregon by proper law adopted the provisions of said Federal Legislation in the year 1917, and further in said year by another State law vested

in the State Highway Commission the authority to take such action and perform such duties as may be necessary to meet the requirements of said Federal Legislation; further to designate and authorize the construction of certain hard surfaced highways, post roads and forest roads, and provide for the construction, paving and maintenance of roads and highways. (P. R. 4, 5.) That under the provisions of said law the said Columbia River Highway between the Multnomah County Line Easterly through the city of Hood River and Hood River County was ordered to be permanently constructed and paved. (P. R. 5.)

Thereafter Congress amended such Rural Post Road Act in 1921. (P. R. 6.)

That the State of Oregon has received many hundreds of Thousands of dollars from the Federal Government under the provisions of said Federal Acts and is now receiving yearly hundreds of thousands of dollars. That the portion of the Columbia River Highway, being 22.11 miles in length, between Multnomah County Line and Hood River is a portion of the interstate highway constructed and used from Astoria, Oregon, into the States of Washington and Idaho, and the Federal moneys have been used under the provisions of said Acts for the construction and reconstruction of the said portion of said Columbia River Highway. And further since January 1920 such portion of said highway has been improved and reconstructed by widening such highway and straightening curves therein. All under the provisions and subject to the Federal Highway Acts. (P. R. 6.)

That at the time of the adoption of said Federal Acts by the State of Oregon in the year 1917, the State of Oregon permitted, allowed and encouraged trucks limited to Five Tons capacity to use the high-

ways. That the plaintiffs and members of said Association had constructed their motor trucks for the said Five Tons capacity, and that thereafter the State of Oregon enacted a law for the first time which fixed the load limit of the gross weight of truck and load. (P. R. 6, 7.)

That until the year 1921 the legislature never vested the State Highway Commission and the County Courts with jurisdiction to modify, amend or change any provisions of any law relating to the capacity of any motor truck or the said gross weight of truck and load. (P. R. 7.)

That after the State of Oregon had been receiving and is still receiving moneys from the Federal Government under the provisions of said Rural Post Road Act, as amended in 1921, and after the said Columbia River Highway had been permanently constructed and reconstructed, with the aid of Federal moneys between Astoria, Oregon and The Dalles, Oregon and beyond, the State enacted another law, as amended in 1923, by the provisions of which the State Highway Commission and the County Courts could grant permits to use a highway by vehicles of more than 22,000 pounds combined weight of truck and load upon giving a bond to indemnify the State or County for any damage caused by such vehicles of a gross weight of more than the combined weight of 22,000 pounds of truck and load. Moreover, said Commission and said County Courts were authorized to reduce the legal maximum weights and speed, whenever any public highway is "BEING DAMAGED BY REASON OF BEING SUBJECTED TO ANY PARTICULAR KIND OR CHARACTER OF TRAFFIC * * * AND FOR THE PROTECTION FROM UNDUE DAMAGES OF ANY HIGHWAY OR HIGHWAYS,

OR OF ANY SECTION OR SECTIONS THERE-OF, TO REDUCE THE MAXIMUM WEIGHT OR SPEED IN THIS ACT." In said law, as amended, an operator of a motor vehicle is liable for damages to highways. Such law, as amended, prescribes penalties amounting not to exceed a \$400.00 fine or imprisonment in a county jail for not to exceed one year, or by both such fine and imprisonment. That said law of 1921, as amended in 1923, fixed the same limit on the combined weight of truck and load as had been in force for some years prior to the year 1921, to-wit 22,000 pounds combined weight of truck and load. Moreover, an additional tax upon the width of tires was exacted and forced the plaintiffs to pay such additional tax in order to operate their trucks with the combined gross weight of truck and load. (P. R. 8.)

After Four years of operation over the said Columbia River Highway, including said portion of said highway involved herein, and after the said passage of said law of 1921, the defendants on the 28th day of August 1925 issued an order reducing the combined maximum weight of truck and load only on that portion of the said Columbia River Highway between Multnomah County Line and Hood River, Oregon. (P. R. 8.)

A copy of such order is made a part hereof and attached hereto, Exhibit "A".

That such order was to take effect on and after October 1st, 1925. (P. R. 9.)

That the defendant issued such order without notice to plaintiffs or any other person, firm or corporation interested and no evidence was considered and no opportunity was ever given to plaintiffs or any other person, firm or corporation interested to present

any evidence in connection with such order, but said order was issued ex parte on the said defendant's own motion. (P. R. 9.)

That the plaintiffs and other members of said Association were forced to and had purchased motor trucks constructed for the purpose of carrying the said combined weight of truck and load, to-wit, 22,000 pounds; that the weight of said motor trucks without load vary from 10,500 pound to 12,000 pounds; that the load capacity of said trucks varied from 10,000 pounds to 11,500 pounds; the schedule of rates as filed and had been in force from Portland, Oregon, and to and through The Dalles, and such rates had been fixed and were fixed and determined by the combined weight of truck and load, to-wit, 22,000 pounds; that the said Columbia River Highway, as aforesaid, from Portland to The Dalles is adjacent and parallel to an existing and operating railway serving such territory; also steamboats operating on the Columbia River are in competition with these plaintiffs; the rates of such other common carriers were considered in the fixing of the rates by these plaintiffs; the plaintiffs must apply to the Public Service Commission to **CHANGE SUCH RATES AND MUST SHOW THAT** any additional increase of rates over the present tariff would be reasonable and just, and in order to operate their trucks on such portion of said Columbia River Highway, the plaintiffs must charge and collect a rate which will practically double the rate now charged; and would destroy the interstate business which has been developed between the States of Oregon, Washington and Idaho; further any such increase of rates would destroy any competition now existing along the said Columbia River Highway, as aforesaid; further the said Public Service Commission would not sanction such increase of rates by the said plaintiffs, as

now filed, as such additional increase would be unreasonable and unjust to the public. (P. R. 9, 10.)

That the portion of said Columbia River Highway from Portland to the East line of Multnomah County, was constructed and hardsurfaced by pavement approximately Eleven Years ago, while the portion of said Highway West of the said Multnomah Line to The Dalles, including the portion in controversy herein was constructed and hardsurfaced by paving about Five Years ago. (P. R. 10.)

That the portion of said Columbia River Highway from Portland to The Dalles was constructed and reconstructed, after the adoption of the said Federal Highway Act in the year 1917, under the direction and control of the State Highway Commission as required under the provisions of the said Federal Highway Act. (P. R. 10.)

That after the year 1917 and prior thereto, motor trucks of the same size, weight and carrying capacity, to-wit, a combined weight of truck and load of 22,000 pounds were and have been operated over said highway from Portland to The Dalles and beyond. That said Columbia River Highway, and especially that portion of the same as set out in the said order herein, was constructed and reconstructed under the provisions of said Federal Highway Act for the purpose of taking care of not only the then traffic on such highway, but also to take care of the future traffic thereon. (P. R. 10.)

That in the year 1920, after the said construction and reconstruction of said highway, Four trucks carrying freight were operated with the combined weight of truck and load of 22,000 pounds and since that time the number of such capacity trucks have been increased until in the year 1925 Nine trucks were

operating on such highway between Portland and The Dalles and beyond that in 1925 other motor vehicles on such highway had increased in number to an average daily of 1500 cars and motor trucks, called motor busses, carrying passengers for compensation on said highway between said points were more in number than said Nine trucks and weigh with bus and load approximately 16,000 pounds; all of such motor busses, as well as other motor vehicles except trucks, operate at the maximum speed of 30 miles per hour. (P. R. 9, 10.)

That the said Exhibit "A" as aforesaid, being the said order of said Commission, recites that the said portion of said highway in controversy is being damaged and injured on account of the kind and character of traffic now being hauled thereon, and by reason of the fact that loads of the maximum gross weight moved at the maximum speed specified in the law are breaking up, damaging and deteriorating the said highway, and the Commission orders not only that the combined weight of truck and load should be reduced from 22,000 pounds to 16,500 pounds, and but that the maximum weight of 600 pounds per inch for tires having a width in excess of 30 inches shall be reduced to 450 pounds per inch of tire width, and that the maximum allowable load for tires having a width of less than 30 inches shall be reduced from 500 pounds to 375 pounds per inch width of tires. It permits only vehicles with a combined weight of load and vehicle of less than 16,500 pounds, and vehicles having a total tire width of less than 30 inches limited to the weight on one axle by multiplying the sum of the tire width of the two wheels on such axle by 375 pounds; and further vehicles having a total tire width of 30 inches or more limited to the weight at contact on the highway with the tread of the two wheels

of any one axle by multiplying the sum of the tire width of the said two wheels of 450 pounds. (P. R. 16, 17.)

Said order provides "that these rules and regulations as made and found by the State Highway Commission under the provisions" of the state law of 1921, as amended, "shall be in force and effect from and after October 1, 1925, until revoked or modified by the State Highway Commission." (P. R. 17.)

The plaintiffs deny the statements contained in such order that the said Nine motor trucks limited to combined weight of truck and load of 22,000 pounds and the speed of 12 miles per hour, are damaging and destroying the said portion of said highway in controversy; the plaintiffs aver that said portion of said highway is in as good a condition as it has been for years and has never been and is not now being damaged or destroyed as set forth in said order, by either the operation of said motor trucks or the said motor busses or said automobiles, further plaintiffs aver that all the other portions of said Columbia River Highway between Portland and The Dalles are in the same good condition and are not and have not been damaged and destroyed by the operation of all the said motor vehicles. (P. R. 11.)

That on information and belief the plaintiffs aver that the defendants admit that said order so made was not based upon either the present or past damage or destruction of said portion of said highway, but solely upon a fear that the said Nine motor trucks might in the future so damage and destroy said portion of said highway, and also it is admitted that said portion of said highway was in first class condition and repair, as well as the other said portions of said highway. (P. R. 11, 12.)

Further on information and belief the plaintiffs aver that the defendants have issued a blanket order covering portions of Fourteen other Federal aided highways limiting the use of motor trucks by reducing the said combined weight from 22,000 pounds to 16,500 pounds, and that such plaintiffs' operation on such portion of said Highway furnishes competition with railroad companies owning and operating railroad lines carrying freight thereon. (P. R. 12.)

The plaintiffs on information and belief aver that the entire cost for a year prior to the issuance of said order for the maintenance and repair of said portion of said highway in controversy did not exceed the sum of \$5,000. (P. R. 12.)

The plaintiffs are willing and able to and will indemnify the defendants by furnishing a good and sufficient bond to pay all damages which they may cause to said portions of said highway in controversy by reason of their motor trucks operating with the combined weight of 22,000 pounds for truck and load, as provided for in the said State Law. (P. R. 12.)

It is alleged that the defendants' actions under the provisions of said sections of the said State laws are arbitrary and unreasonable and are not based upon any hearing, and are contrary to the true facts; that such order discriminates against these plaintiffs and destroys their business and property, as well as prevents the public from enjoying the benefits derived from said operation of said trucks at rates which are now reasonable and just; that such order effects and burdens interstate commerce; and is contrary to and in contravention of the "Federal Highway Act" and the Constitution of the United States, especially the 14th Amendment thereof; it destroys competition; it enables the owners of private automobiles, motor bus-

ses and motor trucks of small capacity to monopolize and use the said Federal aided highway contrary to and in defiance of the said "Federal Highway Act" and the contract made by the said State of Oregon. (P. R. 12, 13.)

The plaintiffs, as well as all other members of said Association, pray the protection of the commerce clause of the Constitution of the United States, the Constitution of the United States and the 14th Amendment thereof, as well as of the contract entered into between the said State of Oregon and the Federal Government, and also the provisions of said "Federal Highway Act", also against the said illegal acts of the said defendants, acting under the provisions of the said sections 35 and 36 of the said laws of 1921 and section 36A of the Law of 1923, on the grounds and for the reasons that the same are contrary to and in contravention of the Constitution of the United States, especially the Commerce Clause thereof and the 14th Amendment thereof, as well as of the contract entered into between the said State of Oregon and the Federal Government, and as well as the provisions of the said "Federal Highway Act". (P. R. 13.)

The plaintiffs and all other members of the Association will be arrested daily in the conduct of their business, if their motor trucks exceed the said combined weight of 16,500 pounds, and will be forced and compelled, either to discontinue their business or to reduce the said combined weight, as fixed by the law at 22,000 pounds, to the combined weight of 16,500 pounds, as provided for in said order, all of which would deprive these plaintiffs of their rights to engage in their said operation of their said motor trucks carrying freight for compensation on the said Fed-

eral aided highway, as well as preventing interstate commerce and would destroy the use of their said motor trucks on said portion of said highway for which privilege the said plaintiffs have paid all fees and charges and the premises considered the plaintiffs will sustain large, heavy irreparable loss, damage and injury, unless given protection by injunction, and the plaintiffs have no plain, speedy and adequate remedy at law. (P. R. 13, 14.)

The matters involved in this controversy exceed in value the sum of \$3,000.00 exclusive of interest and costs. (P. R. 14.)

The plaintiffs pray that a temporary injunction should be issued restraining the defendants from interfering with the operation of plaintiffs' trucks on such portion of such highway operating their trucks with the combined weight of truck and load to-wit, 22,000 pounds, until a final hearing and determination and that a permanent injunction issue enjoining the enforcement of the said order in controversy as being void and unconstitutional, and for other, further and proper relief as may be just and equitable in the premises, including costs and disbursements herein. Further the plaintiffs show that the constitutionality of the State Statute and the enforcement thereof by the defendants is sought to be enjoined and they pray that such application for a temporary injunction should be heard before a court consisting of Three Judges, one of such Judges to be a Circuit Judge. (P. R. 14, 15.)

The defendants filed a motion to dismiss the amended bill of complaint on the sole ground that the facts were not sufficient to constitute a cause of action against the defendants or to entitle the plaintiffs to the relief demanded. (P. R. 17, 18.)

Said application for a temporary injunction was heard and the Court denied said application for such temporary injunction and at the same time, the amended bill of complaint was dismissed and the plaintiffs had refused to plead further, the decree dismissing the cause was entered. (P. R. 24, 25, 26.)

SPECIFICATIONS OF ERRORS

I.

The Court erred in refusing to grant the temporary injunction prayed for.

II.

The Court erred in dismissing the amended bill of complaint.

III.

The Court erred in dismissing the cause of action.

IV.

The said order denying application for temporary injunction and sustaining the motion to dismiss the amended bill of complaint, and the decree dismissing the cause of action are erroneous in these particulars:

- A. That plaintiffs' constitutional rights under the contract between the Federal Government and the State of Washington, evidenced by the "Federal Highway Act" and adoption thereof by the State, were not protected.
- B. In deciding that the provisions contained in Sections 35, 36 and 36A of the State Law of 1921, as amended in 1923, giving the County Courts and State Highway Commission power to limit the capacity of trucks or limit the speed, are constitutional and not contrary to the Federal Constitution, the Federal Legislation, relating to federal aided highways, which the State had duly adopted.
- C. In deciding that the order of said State Highway Commission issued under the said provisions of said law, reducing the maximum weight of truck and load from 22,000 pounds to 16,500 pounds, was constitutional, and did not offend the Federal

Constitution, the Federal Highway and the adoption of the provisions of the said "Federal Highway Act" by the State.

- D. In deciding that the State directly or through the County Courts or the State Highway Commission have the sole jurisdiction and power to promulgate and enforce rules and regulations, relating to the conservation and preservation of federal aided highways or the safety of traffic thereon.
- E. In deciding that the State Highway Commission had the jurisdiction and power to restrict the use of federal aided highways by trucks carrying a combined weight of truck and load in excess of 16,500 pounds without notice or hearing to the owners and operators of such trucks and that the said order was constitutional and not contrary to the Federal Constitution, and the Federal Aid Legislation, as adopted by the State.
- F. In deciding interstate commerce was not burdened.
- G. In deciding that such order was issued and enforced upon the sole reason of emergency, while the admitted facts show no emergency existed.
- H. In deciding that such order did not foster and create a monopoly in favor of railroad companies and steamboat companies, while the admitted facts show that the only grounds for issuing and enforcing such order were to destroy the competition of motor trucks for the benefit of such railroad companies and steamboat companies—not only in intrastate commerce, but also in interstate commerce.
- I. In deciding that such order did not irreparably damage and injure the business of said owners and operators of said trucks, contrary to the Federal Constitution, the Federal Highway Act and contract of the State which adopted and agreed

to abide by all the provisions of said Federal Aid Legislation, as well as the State legislation relating to fees and the Public Service Commission.

- J. In deciding that such order was reasonable and not arbitrary.
- K. In refusing the application for the temporary injunction, although the admitted facts showed that the plaintiffs below, appellants herein offered to safeguard any damage that might arise from operating trucks under the same weight limit which had been fixed for 10 years and was the limit in 1916 when said Post Rural Act had been enacted by Congress, and under which the federal aided highways had been and were now being constructed and reconstructed.

SUMMARY

This matter comes to this Court on appeal from the District Court of the United States of the District of Oregon.

The lower Court, composed of Three Judges, as provided for by Section 266 of the Judicial Code, as amended, denied the application of the plaintiffs below for a temporary injunction, and dismissed the amended bill of complaint, and dismissed the cause of action.

The lower Court filed a written opinion (P. R. 23, 24), and referred to and made a part of such opinion the prior written opinion of the same Court upon the application for a temporary injunction based upon the original bill of complaint. (P. R. 18, 23.)

In support of the order and decree entered in the Court below the following argument is made:

That the Federal Highway Act, adopted by the State of Oregon, protects the plaintiffs' rights and privileges depending upon such joint and concurrent legislation whenever the same are trenched upon; but that the action of the State, as it did in 1921, fixing the maximum load weight of trucks used upon the highways at 22,000 pounds is not and does not constitute a part of that concurrent legislation. It does not relate to any matter within the purview of the joint and concurrent legislation of Congress and the State respecting the construction and maintenance of rural post roads. There is no constitutional or legal reason why the State Legislature might not in 1921 have fixed the maximum truck load less than 22,000 pounds, so that it did not make it so low as practically to rule trucks off the highway, which would raise a legislative question involving discretion

touching the reasonableness of the provisions of the act. Legislation empowered the State Highway Commission in cases of emergency to reduce the carrying weight of trucks until the emergency was relieved again. This is all the commission attempted and is attempting to do in the present case. The order of the commission is temporary, not permanent, it reading "until revoked or modified." The States are compelled to maintain roads constructed in their States; failure so to do vests the Secretary of Agriculture upon proper notice to proceed immediately to place said highways in proper condition. If highways fall into decay or disorder, then the same should be protected until repaired or reconstructed. There is no merit in the contention of the plaintiffs that the order issued by the Highway Commission was entered without notice. The public is not entitled to such notice. The State has paramount control over the use of the highways within its border, and it may enact and enforce reasonable regulations governing traffic over them, necessary to secure their preservation and maintenance, and the public safety. (13 R. C. L. Sec. 212; *Grand Trunk Western Ry. v. South Bend*, 227 U. S. 544). The highways of the State are open to intrastate and interstate commerce alike, and the state cannot, under the guise of legislation deny one engaged in interstate commerce the use of its highways. (*Buck v Kuykendall*, 267 U. S. 307). The State may rightfully prescribe uniform regulation to promote safety upon its highways and the conservation of their use, applicable alike to all vehicles, moving in interstate or intrastate, in the absence of national legislation covering such subject. (*Kendrick v Maryland*, 235 U. S. 610; *Kane v New Jersey*, 242 U. S. 160). The order of the highway commission is not a discrimination against interstate commerce and

does deny such operators of the equal protection of the law.

The fallacy of the above argument is apparent. An examination of the provisions of the Federal Legislation adopted by the State, as set out in the appendix hereto, discloses that the Federal Government had taken sole jurisdiction of federal aided highways for certain purposes, and the State legislation enacted in 1921, as amended in 1922 as well as the order of the State Highway Commission made in the fall of 1925, are prohibited by such Federal Legislation, which vests the Secretary of Agriculture with sole and exclusive jurisdiction to promulgate the rules and regulations for the conservation of such federal aided highways and the safety of traffic thereon.

Moreover, all the allegations of the amended bill of complaint are admitted by the motion to dismiss and all the admitted facts disprove the statements upon which said argument rests. The admitted facts show that there is no emergency but such portion of said federal aided highway is in proper condition of maintenance and repair; that the order was not to prevent such operation of such character of traffic for the purpose of repairing such highway, but for the sole purpose of making a permanent reduction of the carrying capacity of said trucks; no mention is made in such argument that the admitted facts show that such order was made for the purpose of destroying the competition of not only such trucks operating on this portion of said highways, but other trucks operating on portions of other 14 federal aided highways, with railroad lines and steamboat lines; no mention in such argument that the plaintiffs were able to and offered to give proper bond in any amount fixed by the court to safeguard against any damage

done by such operation; it is admitted that the plaintiffs, appellants herein, have been and will daily suffer irreparable damage and loss, not only in their intrastate business, but also in their interstate business.

That the plaintiffs, appellants herein, prayed the protection of the Constitution of the United States, the Federal Legislation, relating to financial aid to States, and the contract which the States adopted and under the provisions of such Federal Legislation, the State has had millions of dollars and is now receiving financial aid from the Federal Government.

ARGUMENT

I.

THE UNITED STATES HAD BEEN VESTED WITH THE SOLE JURISDICTION OVER FEDERAL AIDED HIGHWAYS BY THE LAW ENACTED BY THE STATE IN THE YEAR 1917. AND THE STATE HAD AGREED TO SURRENDER SUCH JURISDICTION TO THE UNITED STATES AND HAS AND IS NOW RECEIVING THE FINANCIAL BENEFITS OF SUCH FEDERAL LEGISLATION.

The portions of such Federal legislation set out in appendix show conclusively that Congress did not intend that the millions and millions of dollars of government moneys should be apportioned to the different States without safeguarding the construction, reconstruction, maintenance of such highways and the safety of traffic thereon.

Congress had prior to the year 1916 been continually harrassed and embarassed by its failure to retain the sole jurisdiction over internal improvements subsidized by the Federal Government.

We refer to a few cases in point.

After the government had ceded to Maryland, Pennsylvania, Ohio and Indiana, the Cumberland Road which had been constructed by the Government under the one consideration, namely, that no tolls could be exacted for the use of stage and coaches carrying mails, and etc., the States of Maryland, Pennsylvania and Ohio by legislative acts endeavored to evade and cancel that one consideration and it was necessary to appeal to the Courts for protection. The Supreme

Court of the United States declared that such State laws were in violation of such contract and the individual operators of such stage coaches were entitled to use such highway carrying United States mail as well as passengers without the exaction of any tolls.

Searight vs. Stokes et al., 3 How. 151, 11 L. ed. 537.

Neil, Moore & Co., v. Ohio, 3 How. 720, 11 L. ed. 800.

Achison v. Hudleson, 12 How. 291, 13 L. ed. 993.

The State of Indiana endeavored to recover moneys which it claimed the Government owed it by reason of the building of such highway out of the sales of the Government's public lands, and the Government was compelled to resist such suit and was successful.

State of Indiana v. U. S., 148 U. S. 148, 37 L. ed. 401.

Congress in 1864 granted the State of Oregon aid in the construction of a military road from Eugene City to the Eastern boundary of the State under certain conditions, viz: "That said road shall be constructed with such width, graduation, and bridges as to permit of its regular use as a wagon road, and in such other special manner as the state of Oregon may prescribe"; further in Sec. 4, it was provided "and when the governor of such state shall certify to the Secretary of Interior that any ten continuous miles of said road are completed," * * *. The state was only authorized to sell the granted land only as the construction had progressed. There was no provision compelling the state to maintain such military

road in good condition and as the Supreme Court said: "Having earned the grant by constructing the road, it may well be that the road company took no further interest in it," * * *.

U. S. v. California & Oregon Land Co., 148 U. S. 31, 37 L. ed. 354, 356, 362.

In 1867 Congress granted to the State of Oregon certain public lands to aid in the construction of a military wagon road from Dalles City, on the Columbia River Easterly to the Idaho line opposite Fort Boise; that such public land should not be disposed of by the state except for such purpose; "That the said road should be and remain a public highway for the use of the government of the United States, free from tolls or other charges upon the transportation of any property, troops or mails of the United States, and the said road should be constructed with such width, gradation and bridges as to permit of its regular use as a wagon road," * * *. The United States endeavored to recover some of the lands granted to the state and sold by it on the ground of the fraud of the Governor.

U. S. v. Dalles Military Road Co., 140 U. S. 599, 35 L. ed. 561, 562.

After the enactment of the Telegraph Act the state of Florida tried by legislative act to prevent the exercise of the rights of a telegraph company under the Act of Congress and the Supreme Court declared such legislation of said State unconstitutional.

Pensacola Tel. Co. v. W. U. Tel. Co., 96 U. S. 1, 24 L. ed. 708.

The Supreme Court declared an act of the State of Idaho unconstitutional which created a monopoly

on the public highway in such State which had been granted government aid.

U. S. v. Union Pacific R. Co., 160 U. S. 1, 40 L. ed. 319.

The United States Supreme Court construed the contract entered into between the United States and a Railroad, under which the government donated public lands to the railroad to aid in its construction in consideration that the United States could have the use of the road "free from all tolls or other charge for transportation of any property or troops of the United States."

Lake Superior Etc., R. R. Co. v. U. S., 93 U. S. 442, 23 L. ed. 965.

The attempts of railroads to evade their contracts with the government based upon land grants, is illustrated by the following cases:

Grand Trunk Western R. Co. v. U. S., 252 U. S. 112; 64 L. ed.

Also:

Wisconsin Central R. Co. v. U. S., 164 U. S. 190; 41 L. ed. 399.

The same situation arose in grants by the United States for construction of canals.

Mr. Justice Peckham in delivering the opinion of the court said:

"Defendant refers to certain grants of land made to Illinois, Indiana, and Ohio, and perhaps to some other states, where such grants were made to aid in the construction of canals in those

states, and where possible profits from the construction of such canals were within the contemplation of the various grants. But in the acts referred to there are no restrictions upon the tolls which the states may charge for the use of their respective canals, the only limitation imposed being that the government should have their free use for the passage of its vessels; while, in this act the tolls which the state may charge are to be only such after the payment for its construction, etc., as should be sufficient to pay the necessary expenses for the care, charge, and repairs thereof.

The state of Michigan, through an Act of the legislature, duly accepted the terms of the Act of Congress, and agreed to carry out all the conditions therein made obligatory upon that state. An attentive reading of that statute shows its purpose to conform to all of the provisions of the Federal statute. * * *.

If any particular part of the statute in this case were ambiguous or its meaning doubtful, of course the intention must be deduced from the whole statute and every part of it. Hence the importance of those provisions which, in effect, if carried out, prevent the state from making any direct profit by the construction of the canal, or from the tolls received from vessels passing through it. And, where words are ambiguous legislative grants must be interpreted most strongly against the grantee and for the government, and are not to be extended by implication in favor of the grantee beyond the natural and obvious meaning of the words employed. Any ambiguity must operate against the grantee and in favor of the public. *Rice v. Minnesota & N. W. R. Co.* 1 Black, 380, 17 L. ed. 154. This rule of construction obtains in grants from the United States to States or corporations in the aid of the construction of public works."

In such Act of Congress there were certain duties imposed upon the States and the Secretary of the Interior was delegated to take charge of all of the matters involved in such contracts. There was no intention that the State would reap profit out of this grant by the government, but the State was to profit from the construction of such internal improvements wholly within the State by the completion and operation of such canal.

U. S. v. Michigan, 190 U. S. 377, 399, 400, 401;
47 L. ed. 1103, 1110, 1111.

When the State adopted and agreed to abide by all of the provisions of such Federal legislation and has and is now receiving financial benefits therefrom, such State is estopped from in any way contesting the sole jurisdiction and authority contained in the said provisions of said Federal legislation.

The State cannot exact toll of any kind.

No project can be initiated except under the approval of the Secretary of Agriculture.

And no moneys can be paid over to the State until after the Secretary of Agriculture has issued proper approval of the construction and reconstruction of any Federal Aided Highway.

The State must comply with the provisions of the Federal legislation which forces the construction or reconstruction with proper material and types of surface so as to make such highway permanent and of such strength and width required to adequately take care not only of the present traffic, but also for the probable future traffic.

It is the duty of the Secretary of Agriculture to carry out the provisions of such Federal legislation

and certify that such highway so constructed or reconstructed is built with such types of surface and material so as to give sufficient strength and width to adequately take care of not only the present traffic, but also the probable future traffic.

It is the duty of the State to keep such highways in proper condition of maintenance, and if it fails to do so, then the Secretary of Agriculture, after due notice and finding that such highway has not been put in proper condition, and it is the duty of the Secretary of Agriculture to put such highway in proper condition of maintenance and use the allotment of such state for such purpose.

The Secretary of Agriculture is vested with the sole jurisdiction and authority to issue all needful rules and regulations for the carrying out of all the provisions of this act, and is vested with the sole jurisdiction to preserve and protect the highways and insure the safety of traffic thereon.

The amendment of 1922 strengthens the provisions of such legislation by the insertion of penalties, so that any one convicted with intent to defraud the United States in any matter relating to the construction, reconstruction, in maintenance etc., shall be punished by imprisonment not to exceed five years or by a fine not to exceed \$10,000.00, or by both fine and imprisonment within said limits.

A study of the above cases and the provisions of the Federal Legislation, adopted by the State, shows conclusively that Congress intended to and did take over the sole jurisdiction, supervision and regulation of such highways and empowered and directed the Secretary of Agriculture to carry out the provisions of such Federal Legislation.

We submit that the United States has the sole jurisdiction over the construction, reconstruction, types of surface, the material used, the width and strength of pavement and the operation of traffic thereon, and the State has lost the power to exact tolls of any kind for the use of such highways and to enact and enforce any law relating to the construction, reconstruction, types of surface, the material used, the width and strength of pavement and to designate the capacity of motor trucks or to interfere in any way with traffic on such highways.

II.

THE PROVISIONS, SEC. 35 AND 36, OF THE STATE LAW ENACTED IN 1921, AS AMENDED IN 1923 AND THE ACTS OF THE STATE HIGHWAY COMMISSION THEREUNDER IN REDUCING THE CAPACITY OF CERTAIN MOTOR TRUCKS, ARE UNCONSTITUTIONAL AND VOID, BEING IN CONTRAVENTION TO AND IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES, THE "FEDERAL HIGHWAY ACT" AND OF ALL THE PROVISIONS OF SAID "FEDERAL HIGHWAY ACT" ADOPTED BY THE STATE IN 1917.

The said State law enacted in 1921, as amended in 1923, (appendix page 67) granted power to County Judges and the State Highway Commission to reduce the capacity of trucks and under which law the State Highway Commission on August 28, 1925, issued an order reducing the capacity of said trucks from 22,000 pounds to 16,500 pounds. (P. R. p. 15, 16.)

It is admitted that the Secretary of Agriculture had not in any ordered, directed or commanded said State Highway Commission to make such order, but it acted on its own volition and thereby obstructed, interfered with and destroyed this character of traffic, namely, trucks built for the carriage of freight with this legal capacity which limit had been fixed for more than 10 years last past and for which character of traffic the said highway in controversy had been constructed and reconstructed. (P. R. p. 6, 10, 20.)

When the State by legislative Act did adopt the provisions of said Federal Legislation and agreed to abide by all of the said provisions, it transferred all of its powers in that respect to the Federal Government.

The "FEDERAL HIGHWAY ACT" provided that the entire jurisdiction over Federal aided highways was to be vested in the Federal Government and gave the power and authority to the Secretary of Agriculture to carry out the provisions of such Act.

The Secretary of Agriculture has the only power to take steps to conserve and preserve such highways and insure the safety of traffic thereon, and the enactment of the said provisions of this law of 1921, as amended in 1923, and the acts of the State Highway Commission in issuing and enforcing such order, were directly in violation and contrary to the agreement made by said State in the adoption of said provisions of said law in the year 1917. (Appendix page 61).

The order issued by the State Highway Commission discloses that the very language used in the provisions of the said "Federal Highway Act," to-wit, "rules and regulations" were adopted by the State Highway Commission under the provisions of the

law of 1921, as amended in 1923. (P. R. p. 17.) In other words the State, indirectly through the State Highway Commission, is exercising jurisdiction and is interfering with the carrying out of the provisions of the said "Federal Highway Act" by the Secretary of Agriculture.

The lower Court decided that these plaintiffs, appellants herein, had a "legal status from which the states can neither withdraw nor alter, modify or qualify,, " whenever "their rights and privileges depending upon such joint and concurrent legislation, are trenched upon." But the Court said that the reduction of such combined weight of 22,000 pounds to 16,500 pounds did not constitute "a part of that concurrent legislation" Again in the opinion it is said that such provisions of said State law of 1921 is a subject embraced by the title. "It does not relate to any matter within the purview of the joint and concurrent legislation of Congress and the state respecting the construction and maintenance of rural post roads." (P. R. p. 21, 22.)

The Supreme Court of the United States speaking by Mr. Justice Brewer said:

"Concurrent jurisdiction, properly so-called, on rivers, is familiar to our legislation, and means the jurisdiction of two powers over one and the same place."

Neilsen v. Oregon, 212 U. S. 315, 319, 53 L. ed. 528, 529.

We are not able to subscribe to the statement that the Federal Government and the State have joint and concurrent jurisdiction, as the provisions of the "Federal Highway Act" as adopted by the State have taken away any jurisdiction from the State over this subject, namely the interference of traffic on Federal

aided highways by reducing the capacity of motor trucks when the Federal Government had determined in the "Federal Highway Act" (appendix page 44) that such highways should be constructed or reconstructed with sufficient width and strength, and types of surface and material, sufficient to adequately take care of the needs of the then traffic as well as probable future traffic and the Secretary has sole jurisdiction to make "rules and regulations" conserving such highways and insuring the safety thereon. It is admitted that the said highways had been for many years used by trucks with the capacity of 5 tons, and by such character of traffic.

A legislative Act, declaring that certain lands which should be purchased for the Indians, should not, thereafter, be subject to any tax, constituted a contract, which could not be rescinded by a subsequent legislative act; such repealing act being void under that clause of the constitution of the United States which prohibits a state from passing any law impairing the obligation of contracts.

State of New Jersey v. Wilson, 7 Cranch. 165,
3 Ld. ed. 303.

Also:

Buck v. Kuykendall, 267 U. S. 307, 69 L. ed.
301.

We refer to the decisions on this question cited under paragraph 1 of this argument.

We submit that said provisions of said State law and the acts of said State Highway Commission are unconstitutional, void and violate the provisions of the Constitution of the United States, the Federal Highway Act and the adoption of the provisions thereof by the legislative Act of the State.

III.

THE ORDER OF THE STATE HIGHWAY COMMISSION BURDENS INTERSTATE COMMERCE AND IS UNCONSTITUTIONAL.

It is admitted that the appellants were engaged in transporting freight between Portland, Oregon and the States of Washington and Idaho for compensation, and that they had been so engaged in such business for many years, using the Federal aided highway from Portland to The Dalles and beyond; and that such appellants had at large expense constructed trucks in order to carry the largest capacity of freight that had been considered for years as the limit capacity. They had paid the largest fees in the State for carrying such capacity; also had obtained permits from the Public Service Commission of the State and as required they had filed their tariffs, which tariffs were just and reasonable and were determined by the said capacity loads, and no tariff could be accepted by said Public Service Commission carrying a charge approximately 100% in excess of the rates now on file; such appellants had been compelled to join with others in the construction and maintenance of a terminal at Portland, Oregon at an expense of many thousands of dollars. Such order, which was made on August 28, 1925, went into force on October 1, 1925, would compel the appellants to cut down their capacity 50%; while such order only covered 22:11 miles from the East Line of Multnomah County Line to Hood River, yet the effect of such order is to cut down the capacity on said Columbia River Highway from Portland to The Dalles and beyond; the appellants are carriers of food products and collect and deliver the same from producer to consumer and deliver to producers articles

necessary in the production of such food products. (The Government in 1919 appropriated \$300,000.00 to the Postmaster General in order to experiment with motor trucks so as to cheapen the cost of food products from producer to consumer. (Appendix page 48) ; such order has irreparably damaged and injured the appellants and their business and has and will burden interstate commerce and destroy their rights and privileges obtained from the said Public Service Commission; such order is a burden on interstate commerce and is contrary to and in violation of the Constitution of the United States and the Federal Highway Act, and the contract of the State in adopting all of the provisions of such Federal Highway Act.

This order has the direct result of effecting the just and reasonable charges on such interstate business, by destroying the present tariffs and doubling the cost of such freight charges, even if the Public Service Commission would find that such increase would be just and reasonable, but such Commission has declared that it would not countenance such increased charges. If the State had directly fixed the present tariff and reduced the same 50% on said interstate business, the appellants would be entitled to an injunction and a decree after final hearing on the ground that such exaction would have been contrary to and in violation of the Constitution of the United States as being arbitrary, unreasonable and confiscatory. We consider that such order has the same effect.

Railroad Commission cases, 116 U. S. 307, 29 L. ed. 636;

Chicago M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970;

Reagan v. Farmers' Loan & T. Co., 154 U. S. 362, 38 L. ed. 1014;

St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567;

Buck v. Kuykendall, 267 U. S. 307, 69 L. ed. 301.

We call the Court's attention to the citations under paragraph 1 in this argument.

SUCH ORDER OF SAID STATE HIGHWAY COMMISSION AND THE ENFORCEMENT THEREOF WERE ARBITRARY, UNREASONABLE, VOID, AND UNCONSTITUTIONAL, AND CREATED A MONOPOLY IN FAVOR OF OTHER COMMON CARRIERS IN COMPETITION WITH THE TRUCKS OF SAID APPELLANTS.

The admitted facts show that there was absolutely no occasion to make such order, as the said portion of said Columbia River Highway was in as good a condition as it had been for years and it had not been and is not being damaged or destroyed by the operation of Nine motor trucks carrying freight with a combined weight of truck and load of 22,000 pounds. (P. R. p. 11.)

Furthermore it is admitted that the said State Highway Commission did not issue said order based upon the present or past damage or destruction of said portion of said highway, but upon a fear that in some future day such Nine motor trucks might so damage and destroy said portion of said Columbia River Highway, and although said portion of said

highway was in first class condition and repair as well as the other said portions of said highway. (P. R. p. 11, 12.)

That said State Highway Commission had issued a blanket order covering 14 other Federal aided highways or portions of the same, and attempted to reduce the said combined weight of truck and load from 22,000 pounds to 16,500 pounds. (P. R. p. 12.)

When the said portion of said Columbia River Highway was constructed and reconstructed there were four trucks operated thereon with the largest legal capacity, and the portion of said Columbia River Highway West from the East Line of Multnomah County had been constructed and reconstructed many years prior to the portion in controversy and used by said trucks with such capacity for many years. (P. R. p. 10, 11.)

In the year 1917 the State enacted a certain law which provided that this said portion of said Columbia River Highway between the East Line of Multnomah County through the City of Hood River, and through The Dalles on to the Idaho Line should be paved with hard surface paving, and that such highway should be permanently constructed and so finished by hard surfacing the same, and that such portion from the said East Multnomah Line through Hood River City through The Dalles to the Idaho State Line was constructed in a permanent manner by hard surfacing by paving, about Five years ago. (P. R. p. 10.)

That under the provisions of the "Federal Highway Act" the Secretary of Agriculture had approved such portion of said highway, declaring that said highway had been permanently constructed by a

proper type of surface and with proper materials so as to take care of not only the then traffic, but the probable increase of traffic thereon.

The Court must presume that the Secretary of Agriculture had carried out the provisions of said "Federal Highway Act" and that the State in constructing and reconstructing said portion of said highway had through its State Highway Commission complied with not only the "Federal Highway Act", but also the commands contained in the said State law. (Appendix page 44).

We are therefore surprised to find that that portion of said highway 22.11 miles in length constructed and reconstructed a few years ago, has been damaged and destroyed by the addition of Five trucks operating as the additional traffic on such portion of said highway, although adjacent portions of the Columbia River Highway constructed and used many years prior are not included in such order. If the Federal and State authorities have exercised their duties, there could be no reasonable justification of such order of said State Highway Commission, and as such highway is in proper maintenance and repair, as admitted by the motion to dismiss the amended bill of complaint, we must conclude that the order of the State Highway Commission which destroyed the operation of trucks carrying the combined weight of truck and load of 22,000 pounds, and the order of same effect regarding the 14 other Federal aided highways, parallel to railroad lines, were made for the sole purpose of destroying the competition by such trucks with the railroad line and steamboat line parallel to the Columbia River Highway and with the railroad lines parallel to the other 14 Federal aided highways. (P. R. p. 9, 10, 12.)

Either the State Highway Commission has, itself or other persons have combined with it, to defraud the United States in the construction or reconstruction of said portion of said Columbia River Highway (see penalty clause in appendix p. 74) or else the acts of said commission are arbitrary and unreasonable.

Cincinnati, N. O. & T. R. Co. v. Rankin, 241 U. S. 319, 60 L. ed. 1022.

We submit that such order is arbitrary and unreasonable and is not based on any facts and is contrary to all the facts.

We call the Court's attention to the citations under paragraph III.

V.

THE LOWER COURT IN DENYING THE APPLICATION FOR INJUNCTION AND ENTERING THE DECREE DISMISSING THE AMENDED BILL OF COMPLAINT AND THE CAUSE, HELD THAT THE SAID ORDER OF SAID STATE HIGHWAY COMMISSION WAS BASED SOLELY UPON EMERGENCY.

The opinion of the lower court recites that the order was made by reason of the emergency existing for the immediate repair of the said 22.11 miles in controversy. (P. R. p. 22, 23.)

An examination of the record in this cause shows that there is not one sentence in said record upon which the lower court could so act.

The record shows that the portion of said highway in controversy was in proper condition of mainten-

ance and repair, and also that there was no necessity for reducing such limit of combined weight of load and truck of 22,000. (P. R. p. 9, 10, 11, 12.)

Moreover, the appellants had offered to file good and sufficient bond in any amount the court would fix, in order to continue their operation of their trucks carrying the combined weight of truck and load and safeguard the State for any damage which might arise from the operation of said trucks with the additional combined weight fixed by said order, to-wit; 16,500. (P. R. p. 12.)

It is admitted that for the year 1925 the State Highway Commission was only compelled to expend \$5,000.00 in the maintenance and repair of said portion of said highway. (P. R. p. 12.)

The silent witness of the record itself shows conclusively that the foundation upon which the lower court rendered its order and decree was contrary to the record.

The order was entered by the State Highway Commission on August 28th, 1925, and was to go into effect 32 days afterwards, namely on October 1st, 1925. (P. R. p. 17.)

After the filing of the original bill and after the decision of the lower court filed on January 11th, 1926, (P. R. p. 18,) based upon the allegations of such original complaint, the plaintiffs below filed the amended bill of complaint on January 25th, 1926. (P. R. p. 1.)

So that from October 1st, 1925, up to January 25th, 1926, when the amended bill of complaint was filed in which it is alleged that such highway was in perfect condition of maintenance and repair and in spite of the fact that all allegations of said amended bill

of complaint were admitted by the said motion to dismiss, the lower court on March 20th, 1926, (P. R. p. 25,) reiterated that the allegations of the amended bill of complaint showed an immediate necessity for repairing such 22.11 miles of such highway and therefore it was necessary for the State Highway Commission to enter said order of August 28th, 1925.

In the opinion of the lower court rendered upon the amended bill of complaint, it is said that the State has the power over the highways in the State and "it may enact and impose reasonable regulations governing the traffic over them, necessary to secure their preservation and maintenance, and the public safety." Further that there is no national legislation covering this subject.

In support of such assertions the court cited the case of *Grand Trunk Western Ry. v. South Bend*, 227 U. S. 644; *Buck v. Kuykendall*, 267 U. S. 307; *Hendrick v. Maryland*, 235 U. S. 610; *Kane v. New Jersey*, 242 U. S. 160. (P. R. p. 24.)

We call attention to this Court that the cases of *G. T. W. Ry. v. South Bend*, *Hendrick v. Maryland* and *Kane v. New Jersey* were determined and decided before the original "Post Road Act" of 1916 was enacted, therefore such decisions have no value in this present discussion. As to the case of *Buck v. Kuykendall*, we are at a loss to know how such case can be an authority against our position. In such case this Court sustained *Buck* in his attempts to have Section 4, of Chapter III, of the Laws of Washington 1921, and the acts of *Kuykendall*, Director of Public Utilities in said State declared void and unconstitutional upon certain grounds, one being the Federal legislation aiding States in the construction of rural post roads, another ground being that inter-

state commerce was burdened by such provisions of said law and the acts of Kuykendall.

We claim that the Buck case decides that the provisions of the "Federal Highway Act" divest the power of the State to legislate in violation of and contrary to said provisions which were adopted by the State by proper legislative act.

We submit that the order denying the application for temporary injunction and the decree dismissing the amended bill of complaint and the cause are erroneous, and that the same be reversed, and your Honorable Court enter such decree as may be proper, the premises considered.

Respectfully submitted,

W. R. CRAWFORD,
EDWIN C. EWING,

Solicitors for Appellants.

Act of July 11, 1916, Ch. 241, 39 Stat. L. 355.

"An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes."

Sec. 1. (Rural post roads—federal aid—freedom from tolls.) That the Secretary of Agriculture is authorized to cooperate with the States, through their respective State highway departments, in the construction of rural post roads; but no money apporportioned under this Act to any State shall be expended therein until its legislature shall have assented to the provisions of this Act, * * *. The Secretary of Agriculture and the State highway department of each State shall agree upon the roads to be constructed therein and the character and method of construction: *Provided*, That all roads constructed under the provisions of this Act shall be free from tolls of all kinds.

Sec. 2. (Definitions—"rural post roads"—"State highway department"—"construction"—"properly maintain.") * * *; the term "construction" shall be construed to include reconstruction and improvement of roads; "properly maintained" as used herein shall be construed to mean the making of needed repairs and the preservation of a reasonably smooth surface considering the type of the road; but shall not be held to include extraordinary repairs, nor reconstruction; necessary bridges and culverts shall be deemed parts of the respective covered by the provisions of this Act. * * *.

Sec. 6. (Project statements, etc.—Submission by States—approval—payment of money apportioned.) That any State desiring to avail itself of the benefits of this Act shall, by its State highway department, submit to the Secretary of Agriculture project statements setting forth proposed construction of any rural post road or roads therein. If the Secretary of Agriculture approve a project, the State highway department shall furnish to him such surveys, plans, speci-

fications, and estimates therefor as he may require: *Provided, however,* That the Secretary of Agriculture shall approve only such projects as may be substantial in character and the expenditure of funds hereby authorized shall be applied only to such improvement. * * *.

When the Secretary of Agriculture shall find that any project so approved by him has been constructed in compliance with said plans and specifications he shall cause to be paid to the proper authority of said State the amount set aside for said project; *Provided,* * * *. The construction work and labor in each State shall be done in accordance with its laws, and under the direct supervision of the State highway department subject to the inspection and approval of the Secretary of Agriculture and in accordance with the rules and regulations made pursuant to this Act.
* * * *

Sec. 7. (Maintenance of roads.) To maintain the roads constructed under the provisions of this Act shall be the duty of the State, or their civil subdivisions, according to the laws of the several States. If at any time the Secretary of Agriculture shall find that any road in any State constructed under the provisions of this Act is not being properly maintained he shall give notice of such facts to the highway department of such State and if within four months from the receipt of said notice said road has not been put in a proper condition of maintenance then the Secretary of Agriculture shall thereafter refuse to approve any project for road construction in said State, or the civil subdivision thereof, as the fact may be, whose duty it is to maintain said road, until it has been put in a condition of proper maintenance. * * *

Sec. 10. (Rules and regulations.) That the Secretary of Agriculture is authorized to make rules and regulations for carrying out the provisions of this Act.

Sec. 11. (Time of taking effect of Act.) That this Act shall be in force from the date of its passage."

Act of Feb. 28, 1919, ch. 69, 40 Stat. L. 1189.

(Act of making appropriations for the service of the Post Office Department for the fiscal year ending June 30, 1920, and for other purposes).

Sec. 6. (Rural post roads—federal aid—appropriation—apportionment—preference in employment of labor.) That for the purpose of carrying out the provisions of said Act, as herein amended, there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the following additional sums: The sum of \$50,000,000 for the fiscal year ending June 30, 1919, and available immediately; the sum of \$75,000,000 for the fiscal year ending June 30, 1920; and the sum of \$75,000,000 for the fiscal year ending June 30, 1921; said additional sums to be expended in accordance with the provisions of said Act: *Provided*, That where the constitution of any State prohibits the same from engaging upon internal improvements, or from contracting public debts for extraordinary purposes in an amount sufficient to meet the monetary requirements of the Act of July 11, 1916, or any Act amendatory thereof, or restricts annual tax levies for the purpose of constructing and improving roads and bridges, and where a constitutional alteration or amendment to overcome either or all of such prohibitions must be submitted to a referendum at a general election, the sum to which such State is entitled under the method of apportionment provided in the Act of July 11, 1916, or any Act amendatory thereof, shall be withdrawn by the Secretary of the Treasury from the principal fund appropriated by the Act of July 11, 1916, or any Act amendatory thereof, upon receipt of the certification of the governor of such State to the existence of either or all of said prohibitions, and such sum shall be carried by the Secretary of the Treasury as a separate fund for future disbursement as herein provided: *Provided further*, that when, by referendum, the constitutional alterations or amendments necessary to the enjoyment of the sum so withdrawn have been approved and

ratified by any State, the Secretary of the Treasury, upon receipt of certification from the governor of such State to such effect, shall immediately make available to such State, for the purposes set forth in the Act of July 11, 1916, or any Act amendatory thereof, the sum withdrawn as hereinbefore provided: *Provided further*, That nothing herein shall be deemed to prevent any State from receiving such portion of said principal sum as is available under its existing constitution and laws: *Provided further*, That in the expenditure of this fund for labor preference shall be given, other conditions being equal, to honorably discharged soldiers, sailors, and marines, but any other preference or discrimination among citizens of the United States in connection with the expenditure of this appropriation is hereby declared to be unlawful.

Act of July 2, 1918.

“An Act Making appropriations for the service of the Post Office Department for the fiscal year ending June thirtieth, nineteen hundred and nineteen, and for other purposes.”

Sec. 7. (TRANSPORTATION OF FOOD PRODUCTS—MOTOR VEHICLE TRUCK ROUTES.)

That to promote the conservation of food products and to facilitate the collection and delivery thereof from producer to consumer, and the delivery of articles necessary in the production of such food products to the producers, the Postmaster General is hereby authorized to conduct experiments in the operation of motor-vehicle truck routes in the vicinity of such cities of the United States as he may select, and under such rules and regulations as he may prescribe, and the cost of such experiments, not exceeding \$300,000, may be paid by the Postmaster General out of any unexpended appropriations of the Postal Service, and the Postmaster General shall report the result of such experiments to the Congress at the earliest practicable date.

Act of November 9, 1921, Ch. —, — Stat. L. —.

“An Act To amend the Act entitled “An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes,” approved July 11, 1916, as amended and supplemented, and for other purposes.”

Sec. 2. (Terms used in Act defined.) That, when used in this Act, unless the context indicates otherwise—

The term “Federal Aid Act” means the Act entitled “An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes,” approved July 11, 1916, as amended by sections 5 and 6 of an Act entitled “An Act making appropriations for the service of the Post Office Department for the fiscal year ending June 30, 1920, and for other purposes,” approved February 28, 1919, and all Acts amendatory thereof or supplementary thereto.

The term “highway” includes rights of way, bridges, drainage structures, signs, guard rails, and protective structures in connection with highways, but shall not include any highway or street in a municipality having a population of two thousand five hundred or more as shown by the last available census, except that portion of any such highway or street along which within a distance of one mile the houses average more than two hundred feet apart.

The term “State highway department” includes any State department, commission, board, or official having adequate powers and suitably equipped and organized to discharge to the satisfaction of the Secretary of Agriculture the duties herein required.

The term “maintenance” means the constant making of needed repairs to preserve a smooth surfaced highway.

The term “construction” means the supervising, inspecting, actual building, and all expenses incidental

to the construction of a highway, except locating, surveying, mapping, and costs of rights of way.

The term "reconstruction" means a widening or rebuilding of the highway or any portion thereof to make it a continuous road, and of sufficient width and strength to care adequately for traffic needs.

The term "forest roads" means roads wholly or partly within or adjacent to and serving the national forests.

The term "State funds" includes for the purpose of this Act funds raised under the authority of the State, or any political or other subdivision thereof, and made available for expenditure under the direct control of the State highway department.

Sec. 6. (Projects receiving Federal aid—approved by Secretary of Agriculture.) That in approving projects to receive Federal aid under the provisions of this Act the Secretary of Agriculture shall give preference to such projects as will expedite the completion of an adequate and connected system of highways, interstate in character.

Before any projects are approved in any State, such State, through its State highway department, shall select or designate a system of highways not to exceed 7 per centum of the total highway mileage of such State as shown by the records of the State highway department at the time of the passage of this Act.

Upon this system all Federal-aid apportionments shall be expended.

Highways which may receive Federal aid shall be divided into two classes, one of which shall be known as primary or interstate highways, and shall not exceed three-sevenths of the total mileage which may receive Federal aid, and the other which shall connect or correlate therewith and be known as secondary or intercounty highways, and shall consist of the remainder of the mileage which may receive Federal aid.

The Secretary of Agriculture shall have authority to approve in whole or in part the systems as designated or to require modifications or revisions thereof: *Provided*, That the States shall submit to the Secretary of Agriculture for his approval and proposed revisions of the designated systems of highways above provided for.

Not more than 60 per centum of all Federal aid allotted to any State shall be expended upon the primary or interstate highways until provision has been made for the improvement of the entire system of such highways: *Provided*, That with the approval of any State highway department the Secretary of Agriculture may approve the expenditure of more than 60 per centum of the Federal aid apportioned to such State upon the primary or interstate highways of such State.

The Secretary of Agriculture may approve projects submitted by the State highway departments prior to the selection, designation, and approval of the system of Federal-aid highways herein provided for if he may reasonably anticipate that such projects will become a part of such system.

Whenever provision has been made by any State for the completion and maintenance of a system of primary * * *

Sec. 8. (Types of surface and kinds of materials for construction, etc., of Federal aid roads.) That only such durable types of surface and kinds of materials shall be adopted for the construction and reconstruction of any highway which is a part of the primary or interstate and secondary or intercounty systems as will adequately meet the existing and probable future traffic needs and conditions thereon. The Secretary of Agriculture shall approve the types and width of construction and reconstruction and the character of improvement, repair, and maintenance in each case, consideration being given to the type and character

which shall be best suited for each locality and to the probable character and extent of the future traffic.

Sec. 9. (Freedom from tolls on Federal aid roads—width of roads.) That all highways constructed or reconstructed under the provisions of this Act shall be free from tolls of all kinds.

That all highways in the primary or interstate system constructed after the passage of this Act shall have a right of way of ample width which shall not be less than eighteen feet, unless, in the opinion of the Secretary of Agriculture, it is rendered impracticable by physical conditions, excessive costs, probable traffic requirements, or legal obstacles.

Sec. 11. (Surveys, plans, specifications, and estimates—approval—setting aside state's share of Federal fund—public land states.)

That any State having complied with the provisions of this Act, and desiring to avail itself of the benefits thereof, shall by its State highway department submit to the Secretary of Agriculture project statements setting forth proposed construction or reconstruction or any primary or interstate, or secondary or inter-county highway therein. If the Secretary of Agriculture approve the project, the State highway department shall furnish to him such surveys, plans, specifications, and estimates therefor as he may require; items included for engineering, inspection, and unforeseen contingencies shall not exceed 10 per centum of the total estimated cost of its construction.

That when the Secretary of Agriculture approves such surveys, plans, specifications, and estimates, he shall notify the State highway department and immediately certify the fact to the Secretary of the Treasury. The Secretary of the Treasury shall thereupon set aside the share of the United States payable under this Act on account of such projects, which shall not exceed 50 per centum of the total estimated cost thereof,

Sec. 12. (State highway department—supervision of work on Federal aid road—approval by Secretary of Agriculture.) That the construction and reconstruction of the highways or parts of highways under the provisions of this Act, and all contracts, plans, specifications, and estimates relating thereto, shall be undertaken by the State highway departments subject to the approval of the Secretary of Agriculture. The construction and reconstruction work and labor in each State shall be done in accordance with its laws and under the direct supervision of the State highway department, subject to the inspection and approval of the Secretary of Agriculture and in accordance with the rules and regulations pursuant to this Act.

Sec. 13. (Payments to State on account of construction, etc., of Federal aid roads—how and when made.) That when the Secretary of Agriculture shall find that any project approved by him has been constructed or reconstructed in compliance with said plans and specifications, he shall cause to be paid to the proper authorities of said State the amount set aside for said project. * * *

Sec. 14. (Failure of state to maintain Federal aid road—duty of Secretary of Agriculture.) That should any State fail to maintain any highway within its boundaries after construction or reconstruction under the provisions of this Act, the Secretary of Agriculture shall then serve notice upon the State highway department of that fact, and if within ninety days after receipt of such notice said highway has not been placed in proper condition of maintenance, the Secretary of Agriculture shall proceed immediately to have such highway placed in proper condition of maintenance and charge the cost thereof against the Federal funds allotted to such State, and shall refuse to approve any other project in such State, except as hereinafter provided. * * *

Sec. 18. (Rules and regulations by Secretary of Agriculture—recommendations.) That the Secretary of Agriculture shall prescribe and promulgate all needful rules and regulations for the carrying out of the provisions of this Act, including such recommendations to the Congress and the State highway departments as he may deem necessary for preserving and protecting the highways and insuring the safety of traffic thereon.

Sec. 19. (Reports to Congress.) That on or before the first Monday in December of each year the Secretary of Agriculture shall make a report to Congress, which shall include a detailed statement of the work done, the status of each project undertaken, the allocation of appropriations, and itemized statement of the expenditures and receipts during the preceeding fiscal year under this Act, an itemized statement of the traveling and other expenses, including a list of employees, their duties, salaries, and traveling expenses, if any, and his recommendations, if any, for new legislation amending or supplementing this Act. The Secretary of Agriculture shall also make such special reports as Congress may request.

Sec. 20. (Moneys available for carrying out provisions of Act.) That for the purpose of carrying out the provisions of this Act there is hereby appropriated, out of the moneys in the Treasury not otherwise appropriated, \$75,000,000 for the fiscal year ending June 30, 1922, \$25,000,000 of which shall become immediately available, and \$50,000,000 of which shall become available January 1, 1922.

Sec. 21. (Expenditures for administering provisions of act and for research work—deduction from appropriation—apportionment of remainder to states—ratio of apportionment.) That so much, not to exceed $2\frac{1}{2}$ per centum, of all moneys hereby or hereafter appropriated for expenditure under the provis-

ions of this Act, as the Secretary of Agriculture may deem necessary for administering the provisions of this Act and for carrying on necessary highway research and investigational studies independently or in cooperation with the State highway departments and other research agencies, and for publishing the results thereof, shall be deducted for such purposes, available until expended.

Act of June 19, 1922, ch. 227, 193, — Stat. L.—

Sec. 4. (Rural Post Roads—"Federal Highway Act"—appropriations.) That for the purpose of carrying out the provisions of the Act entitled "An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes, "approved June 11, 1916, and all Acts amendatory thereof and supplementary thereto, there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the following additional sums, all such sums to be expended in accordance with the provisions of such Act:

The sum of \$50,000,000 for the fiscal year ending June 30, 1923,

The sum of \$65,000,000 for the fiscal year ending June 30, 1924,

The sum of \$75,000,000 for the fiscal year ending June 30, 1925.

Par. 6. (False statements and representations concerning projects under "Federal Highway Act"—penalty.) If any officer, or employee of the United States, or any other officer, agent, or employee of any State or Territory, or any person, association, firm, or corporation or any officer or agent of any person, association, firm, or corporation shall knowingly make any false statement, false representation, or false report as to the character, quality, quantity, or cost of the material used or to be used, or the quantity or quality of the work performed, or the costs thereof in connection with the submission of plans, maps, specifications, contracts, or costs of construction of any project submitted for approval to the Secretary of Agriculture under the provisions of the Federal Highway Act, or shall knowingly make any false statement, false representation, or false report or claim for work or materials for the construction of any project approved by the Secretary of Agriculture

under said Federal Highway Act and all amendments thereto, or shall knowingly make any false statement or false representation in any report required to be made under said Federal Highway Acts supplementary thereto with the intent to defraud the United States shall, upon conviction thereof, be punished by imprisonment not to exceed five years or by a fine not to exceed \$10,000, or by both fine and imprisonment within said limits, (42 Stat. L. 661.)

Act of Feb. 12, 1925, ch. 219, 43 Stat. L. 889.

An Act to amend the Act entitled "An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes," approved July 11, 1916, as amended and supplemented, and for other purposes.

Sec. 1. (Rural post roads—appropriation—apportionment—Act of July 11, 1916 amended.) That for the purposes of carrying out the provisions of the Act entitled "An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes," approved July 11, 1916, and all Acts amendatory thereof and supplementary thereto, there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the following sums, to be expended according to the provisions of such Act as amended:

The sum of \$75,000,000 for the fiscal year ending June 30, 1926;

The sum of \$75,000,000 for the fiscal year ending June 30, 1927.

Immediately upon the passage of this Act and thereafter not later than January 1, of each year, the Secretary of Agriculture is authorized to apportion among the several States, as provided in section 21 of the Federal Highway Act approved November 9, 1921, the \$75,000,000 herein authorized to be apportioned for the fiscal year ending June 30, 1926, and on or before January 1, next preceding the commencement of each succeeding fiscal year he shall make like apportionment of the appropriation herein authorized, or which may be hereafter authorized, for each fiscal year; *Provided*, That the Secretary of Agriculture shall act upon projects submitted to him under his apportionment of this authorization, and his approval of any such project within three years shall be deemed a contractual obligation of the Federal Government for the payment of its proportional contribution thereto.

Act of June 22, 1926

An Act to amend the Act entitled "An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes," approved July 11, 1916, as amended and supplemented, and for other purposes.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That for the purposes of carrying out the provisions of the Act entitled "An Act to provide that the United States shall aid the States in the construction of rural post roads and for other purposes," approved July 11, 1916, and all Acts amendatory thereof and supplementary thereto, there is hereby authorized to be appropriated, the following additional sums, to be expended according to the provisions of such Act as amended:

The sum of \$75,000,000 for the fiscal year ending June 30, 1928,

The sum of \$75,000,000 for the fiscal year ending June 30, 1929.

Sec. 2. For carrying out the provisions of section 23 of the Federal Highway Act, approved November 9, 1921, there is hereby authorized to be appropriated for forest roads and trails, out of any money in the Treasury not otherwise appropriated, the following additional sums, to be available until expended in accordance with the provisions of said section 23.:

The sum of \$7,500,000 for the fiscal year ending June 30, 1928,

The sum of \$7,500,000 for the fiscal year ending June 30, 1929.

Not later than January 1 next preceding the commencement of each fiscal year the Secretary of Agriculture is authorized to apportion among the several

States the appropriations heretofore, herein, or hereafter made or authorized to be made as provided in section 23 of the Federal Highway Act approved November 9, 1921.

Sec. 3. That in any State where the existing constitution or laws will not permit the State to provide revenues for the construction, reconstruction, or maintenance of highways, the Secretary of Agriculture shall continue to approve projects for said State for the period covered by this Act if he shall find that said State has complied with the provisions of this Act in so far as its existing constitution and laws will permit.

Sec. 4. All Acts or parts of Acts in any way inconsistent with the provisions of this Act are hereby repealed, and this Act shall take effect on its passage.

Act of February 16, 1917, ch. 175 of Gen. L. of Oregon, 1917

"An Act to accept the benefits of the Act passed by the sixty-fourth Congress of the United States, entitled "An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes," and to provide for the issuance of bonds of the State of Oregon to raise such money as may be required to meet the requirements of said Federal statute, and to authorize the State Board of Control to take action and to perform such duties as may be necessary to meet the requirements of said Federal Act and Federal officials acting under said Act."

"Section 1. That the State of Oregon hereby accepts the provisions of said Act and agrees to cooperate with the Federal Government in carrying out the provisions thereof.

Section 3. The State board, commissioners or officers having control of the State highway in the State of Oregon are hereby authorized, empowered and directed to enter into such contracts, appoint such officers and do any other act or thing necessary to fully meet the requirements of the United States and the officers acting under said Federal statute."

Act of January 9, 1926, ch. 237 of Gen. L. of Oregon,
1917

“An Act to provide a general system of construction, improvement and repair of State highways and for the administration and operation thereof, and repealing Chapter 229 of the General Laws of Oregon for 1913, and Chapter 337 of the General Laws of Oregon for 1915, and declaring an emergency.

ARTICLE II.

THE HIGHWAY COMMISSION; POWERS; DUTIES

Section 5. **POWERS AND DUTIES OF COMMISSION.** Said Commission shall have the power to carry out the provisions of this Act, and its duties shall be such as are provided herein. Said Commission shall designate, construct or cause to be constructed a system of State highways within the State of Oregon, which highways shall be designated by number, and by the point of beginning and terminus thereof. That the legislature of the State of Oregon hereby assents to the provisions of the Act of Congress, approved July 11, 1916, entitled "An Act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes" (39 U. S. Statutes at Large, page 355). The State Highway Department is hereby authorized to enter into all contracts and agreements with the United States Government relating to the survey, construction or improvement and maintenance of roads under the provisions of the said Act of Congress, to submit such scheme or program of construction or improvement and maintenance as may be required by the Secretary of Agriculture, and do all other things necessary fully to carry out the co-operation contemplated and provided for by the said Act. For the construction or improvement and maintenance of rural post roads the good faith of the State is hereby pledged to make available funds sufficient to equal the funds apportioned to the State by or under the United States Government during each of the five years for which Federal funds are appropriated by Section 3 of the said Act, and to maintain the roads constructed or improved with the aid of funds so appropriated, and to make adequate provisions for carrying out such maintenance. The good faith of the State is further pledged to make available funds at least sufficient when combined with the funds made or to be made by the sev-

eral counties to equal the sum apportioned to the State by the Secretary of Agriculture under the rules and regulations approved by him for carrying out Section 8 of the Act of Congress; *provided*, that funds made so available from the State Highway Fund shall be spent only upon the highways comprising the system of State roads, and the good faith of the State is further pledged to maintain such roads and to make adequate provisions for carrying out such maintenance, and other Acts of Congress for similar purposes."

Act. of February 21, 1917, Ch. 432 of the Gen. L. of
Oregon 1917

"An Act to provide for the construction of roads and highways in the State of Oregon; to provide for the issuance of bonds by the State of Oregon to raise money to carry out the purposes of this Act; to authorize the State highway commission to take such action and perform such duties as may be necessary to meet the requirements of this Act; to designate and authorize the construction of certain hard-surfaced highways and certain post roads and certain forest roads, and to provide for other post roads and forest roads; to provide for the letting of contracts for the construction, paving and maintenance of roads and highways; to make the surplus arising from the fees collected under House Bill No. 509 of the present legislative session a fund under the jurisdiction of the State Highway Commission with which to pay interest and principal on bonded indebtedness of the State, contracted by the State for road purposes, and other lawful claims incurred by said Commission, and to provide for modifying the terms of House Bill No. 21 passed by the Twenty-ninth Legislative Assembly of the State of Oregon, and to provide for submitting this Act to the people and for the calling for a special election therefor, and declaring an emergency." * * * *.

"Section 6. The highways described in Sections 6 and 7 of this Act are hereby determined to be the highways of first importance to the general public of the State of Oregon. It is hereby determined that the following highways should be permanently constructed and finished with a hard surface:

1. The Columbia River Highway from the Multnomah County line to Astoria, Seaside, and south in Clatsop County to the Tillamook County line. Inasmuch as the counties of Columbia and Clatsop have already expended large sums of money in constructing the said Columbia Highway through said counties and in doing so have practically exhausted their abili-

ty to raise money by an issuance of county bonds, the State Highway Commission is hereby authorized, from the funds arising under this Act, in addition to paving said highway, to use from said funds sufficient to provide for the preparation of said highway through said counties for the paving thereof.

4. Such portions of the Columbia River Highway between the Multnomah County line Easterly through the City of Hood River and Hood River County and through The Dalles and Wasco County,; thence up the Umatilla River through Hermiston, Stanfield, Echo and Pendleton, and thence by such route as shall be determined by the State highway commission to La Grand, Baker, and to the Idaho line, as the county courts of the various counties affected shall agree to prepare the road ready for paving. *Provided*, that inasmuch as the County of Hood River has raised by a bond issue and expended upon said Columbia River Highway practically its full constitutional limit said Commission may expend on said Columbia River Highway in Hood River County, such portion of the money arising under this Act as it may deem proper in preparing said Columbia River Highway for paving.

6. Commencing on the Columbia River Highway at or near Arlington in Gilliam County, thence up Willow Creek in Morrow County, through the Cities of Ione, Lexington and Heppner in Morrow County and through Pilot Rock, Pendleton, Adams, Athena, Weston, Milton and Freewater in Umatilla County to the Oregon and Washington State line."

Oregon Motor Vehicle Law, Chapter 37, Laws 1921

(As amended by Laws enacted by the Special Session of the Legislative Assembly in 1921 and by the Regular session in 1923)

"An Act providing for regulating the use, registration, licensing, taxing, identification, conduct and operation of vehicles and bicycles in the state of Oregon, and for the protection of same; the registration and licensing of persons operating same; providing for punishment for violation of this act; prohibiting the unauthorized use or possession of a vehicle; limiting the authority of cities and towns on subjects concerned with said vehicles and bicycles; providing for the disposition of funds derived from operation of this act, and repealing sections 2223-1, 4768, 4769, 4770, 4771, 4772, 4773, 4774, 4775, 4776, 4777, 4778, 4779, 4780, 4781, 4782, 4783, 4784, 4785, 4786, 4787, 4788, 4789, 4790, 4791, 4792, 4793, 4794, 4795, 4796, 4797, 4798, 4799, 4800, 4801, 4802, 4803, 4804, 4805, 4806, 4807, 4808, 4809, 4810, 4811, 4812, 4813, and 4814, Oregon Laws and all other acts and parts of acts in conflict herewith."

Section 1. DEFINITION OF TERMS. * * *

4. The term "hard surfaced highways" shall mean every highway constructed and/or surfaced of such material or combination of materials as to produce what is commonly known at the present time as "pavement" as distinguished from and not including such construction and or surfacing as is commonly known at the present time as "macadam" or "gravel."

Section 25. REGISTRATION OR LICENSE FEES FOR MOTOR VEHICLES.

Motor trucks, trailers and semitrailers equipped with one or more solid tires shall be based on the to-

tal tire width of such vehicles according to the following schedule:

	Motor Trucks	trailers and Semi- Trailers
Less than 14 in. and not over 14 in.	\$35.00	\$17.50
Over 14 in. and not over 17 in.	42.00	21.00
Over 17 in. and not over 22 in.	55.00	27.50
Over 22 in. and not over 26 in.	65.00	32.50
Over 26 in. and not over 30 in.	105.00	52.50
Over 30 in. and not over 36 in.	126.00	63.00
Over 36 in. and not over 40 in.	140.00	70.00

Section 27. LIMITING THE CONCENTRATED WEIGHT IN POUNDS ON EACH AXLE OR VEHICLE.

(b) On any vehicle having a total tire width of thirty inches and more than thirty inches the concentrated weight in pounds bearing on the surface of the highway at contact with the tread of the two wheels of any one axle of such vehicle shall not exceed the product of the sum of the tire widths of the two wheels of such axle multiplied by six hundred (600).

Section 29. LIMITING RATES OF SPEED OF VEHICLES AND MOTOR TRUCKS.

(b) All other motor vehicles, including trucks. When the total tire width is—

	Miles per Hour When Equipped With	
	Pneuma- tic Tires	Solid Tires
Not over 14 inches	25	30
Over 14 in. and not over 16 in.	20	25
Over 16 in. and not over 22 in.	15	22
Over 22 in. and not over 30 in.	16	20
Over 30 in.	12	18

Section 33. LIMITING THE COMBINED WEIGHT OF ANYTHING MOVING OVER THE HIGHWAYS OF THE STATE.—No vehicle, motor vehicle, motor truck, device or thing having a combined weight in excess of twenty-two thousand (22,000) pounds at contact of the four wheels of any such vehicle with the surface of the highway, or a combined weight of more than seventeen thousand six hundred (17,600) pounds at contact of the two wheels of any one axle of any such vehicle, or of a combined weight of more than twenty-two thousand (22,000) pounds if a device not equipped with wheels, shall be moved over or upon any highway of this state without the written permission of the state highway commission if a state highway, or of the state highway commission and the county court of the county in which such road is located, if a county road. (Laws 1921, Special Session, Chap. 8, Sec. 7.)

Section 35. HIGHWAY COMMISSION AND COUNTY COURT MAY GRANT SPECIAL PERMITS.—Upon receipt of an application for permission to move over any highways of this state, any vehicle, article, property, or thing having a combined weight in excess of twenty-two thousand (22,000) pounds, the state highway commission, in case of state highways, or the county court, in case of county roads, to whom such application may be made, shall investigate the representations made in said application and, if in the judgment of said state highway commission, in case of state highways, or of such county court, in case of county roads, the interest of the public will be served by the proposed movement, the state highway commission or such county court, as the case may be, may grant written permission for such movement, which shall include such terms, rules, stipulations and conditions as said commission or said court, as the case may be, may deem to be necessary or desirable for the protection of the highways and of the public interest; provided, however, that in every such case the state highway commission or the county court, as the case may be, shall require the ap-

plicant for such permit to furnish a good and sufficient bond or indemnity for any damage to the highways that may be caused by such movement. Said bond shall be in such amount as the state highway commission or the county court, as the case may be, may deem necessary for the full protection of the public interest and shall be filed with the commission or court, as the case may be, granting authority or permission, as the case may be. No movement of any such vehicle, device or thing shall begin until said permission has been granted and the required bond has been filed and accepted by the highway commission or the county court, as the case may be. The highway commission or the county court, as the case may be, may in its discretion, appoint one of its officers or agents to be present at and during the movement, but the presence of such officer or agent, or any interference or suggestions offered or made by such agent, shall not be deemed to be supervision of the movement, or in any manner to relieve the party to whom such permit has been granted, or the sureties on said bond, from sole responsibility for every damage that may be done by such movement; provided, however, that if in the opinion of said officer or agent of said highway commission or county court, as the case may be, the terms, rules, stipulations and conditions of the permit granted for such movement are not being complied with, such agent may [be], and he is hereby, authorized to order such movement to be forthwith stopped. (Laws 1921, Special Session, Chap. 8, Sec. 9.)

Section 36. THE STATE HIGHWAY COMMISSION AND COUNTY COURTS MAY LIMIT WEIGHTS AND SPEEDS AND CLOSE HIGHWAYS.—Whenever the highway commission or any county court or board of county commissioners of any county of this state shall find that any public highways of the state or section thereof is being damaged by reason of being subjected to any particular kind or character of traffic, or shall find that, in the judgment of the state highway commission or of any coun-

ty court or board of county commissioners of any county of this state, it would be for the best interests of the state or county and for the protection from undue damages of any highway or highways or of any section or sections thereof and, with respect to such highways or any sections thereof, to reduce the maximum weights and speeds in this act provided for vehicles moving over or upon the highways of this state, or if, in the judgment of the state highway commission or of any county court or board of county commissioners of any county of this state, it would be for the best interests of the state or of the county and for the protection from undue damage of any highway or highways or of any sections thereof to close such highway or highways or any sections thereof for any or all traffic or for any particular class of traffic, or for the moving thereon of any kind, size or weight of vehicles or any kind of commodity, freight or thing, then, in that event, the state highway commission or the county court or board of county commissioners of any county may, and is hereby authorized and empowered to, determine and fix the reduced weights and speeds, which shall be the maximum weights and speeds for vehicles or things moving over such highway or highways or any sections thereof, and or to prohibit the use of such highway or highways or any section or sections thereof for moving thereon any kind, size or weight of vehicle or any kind of commodity, freight or thing, for such period or periods of time as, in the judgment of said state highway commission or county court or board of county commissioners, will be for the best interest of the state or county; provided, that the authority herein granted shall not authorize the closing of any road or section thereof to the movement or transportation thereover of products of the soil by persons having no other road or highway upon which to travel, but the hauling of such products over such highway shall be subject to the rules and regulations of the county court, board of county commissioners of any county of the state or the state highway commission, as the case may be. This proviso, however, does not apply when

it becomes necessary to close any road during construction. The highway commission or any county court or board of county commissioners of the respective counties of this state may make and include in such order any rule or regulation not inconsistent with the foregoing provisions and authority for the preservation and protection of any public highway or section thereof, and any violation of any of the rules, regulations, terms, conditions or provisions of said order shall be deemed a violation of the provisions of chapter 371, General Laws of Oregon, 1921, as amended by chapter 8, General Laws of Oregon, 1921, and any person or corporation who violates any of the said provisions or any part of said order shall, upon conviction thereof, or upon entering a plea of guilty, be punished by a fine of not to exceed \$400 or by imprisonment in the county jail for not to exceed one year, or by both such fine and imprisonment in the discretion of the court. The state highway commission or the county court or board of county commissioners, as the case may be, shall post a notice in a conspicuous manner and place, so it can be readily seen and read, at each end of any highway or section thereof, for which limitations of traffic, as in this section provided, have been determined and fixed. Such notice shall state plainly the limitations or prohibitions of traffic determined and fixed; provided, that the authority granted in this section to the county courts or boards of county commissioners shall be limited to county roads and shall not extend to state highways over which the state highway commission is hereby granted exclusive control, and the said authority granted in this section to the state highway commission shall, as to said commission, be limited to state highways only. (Laws 1921, Special Session, Chap. 8, Sec. 10; Laws 1923, Chap. 145, Sec. 1.)

Section 36-A. LIABILITY FOR DAMAGE TO HIGHWAYS.—Any person using the highways or bridges of this state in violation of any of the provisions of this act shall, in case such highway or bridge so used be a state highway or bridge, or in case

such highway or bridge so used be a county highway or bridge, be liable to the state or to the county, as the case may be, for all damage done to said highways or bridges by virtue of said violations. (Laws 1921, Special Session, Chap. 8, Sec. 11.)

Section 40. **POWER TO ARREST; IMMEDIATE TRIAL; PROCEDURE.**—Any police officer of any city, any marshal, deputy marshal or watchman of any incorporated town, or any sheriff or deputy sheriff of any county, or any constable of any district, shall have full power and authority within the limits of their jurisdiction, or as hereinafter provided, to arrest any person or persons known personally to any such officer to have violated any of the provisions of this act, and to immediately bring such offenders before any magistrate having jurisdiction, and any such persons so arrested shall have the right to an immediate trial and all other rights given to any person arrested for having committed a misdemeanor; and if such hearing can not then be had, be released from custody on giving his personal undertaking to appear in answer to such violations at such time and place as shall be indicated, secured by the deposit of a sum equal to the maximum penalty for the offense charged, or in lieu thereof by leaving the vehicle being operated by such person with such officer or in case such officer be not accessible, be forthwith released from custody on giving his name and address to the officer making such arrest and depositing with such officer a sum equal to the maximum fine for the offense for which such arrest is made, or in lieu thereof by leaving the vehicle being operated by such person with such officer; provided, that in such case the officer making such arrest shall give a receipt in writing for such sum or vehicle and notify such person to appear before the most accessible magistrate, naming him, on that or the following day, specifying the place and hour. In case security shall be deposited as in this section provided, it shall be returned to the person forthwith on such person being admitted to bail.

Section 41. PENALTIES FOR VIOLATIONS.

—Any person who violates any of the provisions of this act or who fails to provide himself with the proper limit, license or licenses prescribed herein, shall, upon conviction thereof, or upon entering a plea of guilty to a complaint or indictment charging him with violation of any of the provisions of this act, unless otherwise provided in this act, be punished by a fine of not to exceed four hundred dollars (\$400), or by imprisonment in the county jail not to exceed one year, or by both such fine and imprisonment, in the discretion of the court. The court before whom such conviction may be had, may also, in its discretion, and as a part of the punishment for a violation of this act, suspend, for a period not to exceed one year, the license or permit of the person so convicted. Justices of peace and district judges are hereby given concurrent jurisdiction with circuit courts to try and dispose of violations of the provisions of this act.

Local magistrates, within their respective jurisdictions, are also hereby given the power to permanently revoke any license referred to herein, upon conviction of the licensee of a violation of any city ordinance having for its purpose the regulations of traffic or the operation of motor vehicles, when such ordinance is not inconsistent with the provisions of this act.





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United States Court of the United States

October Term, 1926

No. 372

R. H. BROWN, DOING BUSINESS AS MORRIS
B. BROWN, R. H. BROWN AND LEW
BROWN, ET AL. *Appellants*

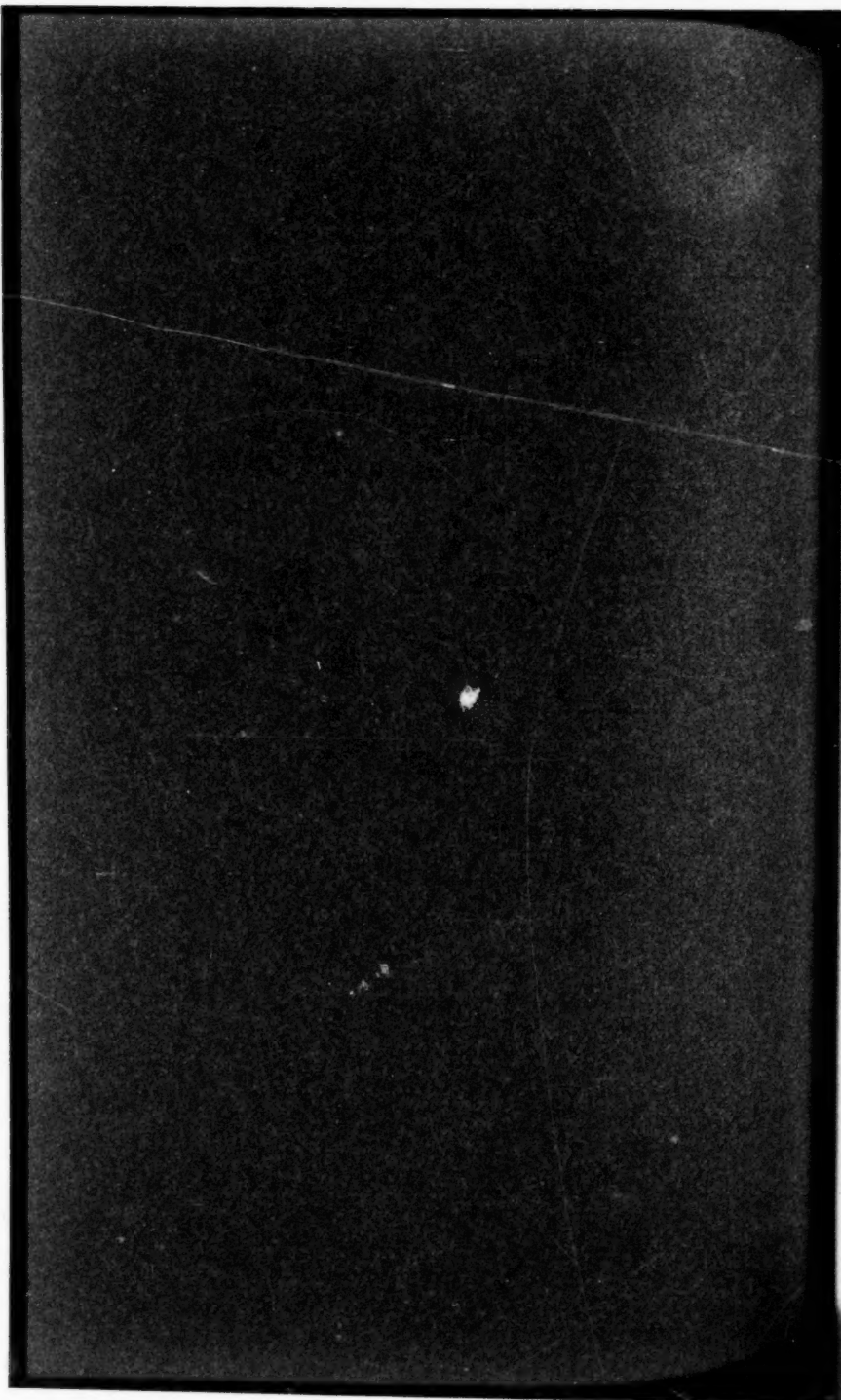
VS.
J. M. DUFFY, H. B. VAN DUZER, AND W. H.
MALONE, ET AL. *Appellees*

Appeal from the District Court of the United States
for the District of Oregon

REPLY BRIEF OF APPELLANTS

W. E. STANSBURY
C. E. EWING

Counselors for Appellants



Supreme Court of the United States

October Term, 1926

No. 372

R. B. MORRIS, DOING BUSINESS AS MORRIS
& LOWTHER; H. M. HEWITT AND LEW
NUNAMAKER, ETC., ET AL., *Appellants.*

vs.

WM. DUBY, H. B. VAN DUZER, AND W. H.
MALONE, ETC. *Appellees.*

*Appeal From the District Court of the United States
for the District of Oregon*

REPLY BRIEF OF APPELLANTS

W. R. CRAWFORD,
EDWIN C. EWING,
Solicitors for Appellants.

REPLY BRIEF OF APPELLANTS

We desire to say that the appellees were served with our brief in strict accordance with Rule No. 25 of the Supreme Court of the United States.

As we view the questions presented by the record it would be a waste of time to debate the various arguments advanced in the brief of the appellee, so we shall confine our reply to the questions presented in the record.

Appellees' brief calls attention to Section 1 of the Rural Post Road Act of 1916, in which the following language is used: "That the Secretary of Agriculture is authorized to cooperate with the States, through their respective State highway departments, in the construction of rural post roads;" and thereupon declare that such statement shows that the Federal Government had taken no jurisdiction over Federal aided highways, and that the State had paramount control over the same. Section 1 of such Act of 1916, in which such statement is found, was repealed by the "Federal Highway Act" of 1921, and no foundation even can be laid to base such argument upon.

We find in appellees' brief the statement that under the provisions of the Act of 1916, the Secretary of Agriculture could only "make rules and regulations for carrying out the provisions of this Act." Unfortunately again the appellees omitted any reference to Sec. 18 of the "Federal Highway Act," (appendix p. 54) in which Congress enlarged the power of the Secretary of Agriculture so as to read: "THAT THE SECRETARY OF AGRICULTURE SHALL PRESCRIBE AND PROMULGATE ALL NEEDFUL RULES AND REGULATIONS FOR THE CARRY-

ING OUT OF THE PROVISIONS OF THIS ACT, INCLUDING SUCH RECOMMENDATIONS TO THE CONGRESS AND THE STATE HIGHWAY DEPARTMENTS AS HE MAY DEEM NECESSARY FOR PRESERVING AND PROTECTING THE HIGHWAYS AND INSURING THE SAFETY OF TRAFFIC THEREON."

It is claimed by the appellees that the State directly, or by the appointment of a State highway department, can by legislative act, passed after the enactment of the Federal Act of 1916, take exclusive control over Federal aided highways without any reference to the terms and conditions under which the Government had extended financial aid. They claim that the Act of the State in 1921, as amended in 1923, authorizing the State Highway Commission to change and modify the provisions of the State Law by reducing the weight of truck and load, is legal and exclusively within the power of the State.

In other words that the defendants have the exclusive jurisdiction to reduce the gross weight of truck and load from 22,000 pounds to 16,500 pounds, which has been the weight for many years and was such weight when the Act of 1916 had been enacted. (brief p. 9, P. R. 10.)

We have cited a large number of authorities in our original brief, showing the attempts of States to override the plain provisions of Acts of Congress which had granted financial aid to States. Two of said cases cited arose in the State of Oregon. The Government endeavored to recover lands which had been granted to such State, for the purpose of giving financial aid to the State in the construction of Highways extending from the Ocean to the Idaho line. The only conditions exacted by the Government were that

such highways could be used by the Government without any tolls, and the other was that whenever a certain mileage of road had been constructed and such construction had been approved by the Governor, the State would be given a part of the public lands owned by the Government. After a lapse of some years the Government found that such roads had not been constructed and in place there was no evidence that any road had even been constructed, the Government instituted suits against divers people to recover back lands which had been sold under such land grant. The Government did not recover such lands, because the owners of the same were bonafide purchasers, and the Government lost all of such lands and the public had not received any benefit therefrom.

U. S. v. California & Oregon Land Co.
148 U. S. 31, 37 L. ed. 354.

U. S. v. Dalles Military Road Co.
140 U. S. 599, 35 L. ed. 561.

After the passage of the Rural Post Road Act of 1916, Congress, in 1918, appropriated \$300,000.00 to enable the Postmaster General to experiment with the use of trucks in the vicinity of the cities of the United States so as to promote the collection and delivery of food products along the highways and machinery and materials necessary in the production of such food products. (appendix p. 48.)

With the knowledge obtained, Congress broadened the provisions of the Rural Post Road Act and amended the same by the "Federal Highway Act" of 1921, so as to authorize and direct the Secretary of Agriculture to supervise and control the construction and reconstruction of Federal aided highways, but to determine the types of surface, character of material,

width and strength of such highways, in order to furnish a permanent highway with such strength as was necessary to carry not only the then traffic, but also probable increased traffic; and that the use of said highways should be placed under the control of the Secretary of Agriculture so as to **PRESERVE AND PROTECT SUCH HIGHWAYS AND SECURE THE SAFETY OF TRAFFIC THEREON.** (appendix pp. 49-55.)

Again in 1922 Congress enacted penalty clauses in relation to the making, by any one, of false statements and representations concerning the projects which had come under the provisions of said "Federal Highway Act." (appendix p. 56.)

The State enacted a law in 1921, and amended the same in 1923, for the first time authorized the State Highway Commission to reduce the said weight of 22,000 pounds for truck and load, and that for over five years no attempt was made to enforce such a power so granted to said Commission.

The record discloses that the said portion of said highway West of the said East line of Multnomah County had been constructed many years prior to the portion in controversy, and had been subjected to the same use, but with increased traffic, yet no attempt has ever been made by said State Highway Commission to interfere with that portion of said Columbia River Highway; the portion of said highway East of Hood River to The Dalles was constructed and paved at the same time and with the same material, and under the supervision of the Secretary of Agriculture, yet no action has ever been attempted to reduce such weight of truck and load. (brief p. 9, P. R. 10.)

The record discloses that this State Highway Commission did single out fourteen other Federal aided

highways, being the principal highways in the State, at about the same time the order was entered in connection with this portion of said Columbia River Highway, and selected only portions of said highways, generally in the middle of their length, by a blanket order reducing such weights to 16,500 pounds; and it is charged and it is admitted that the only occasion by the order in this case and the blanket order relating to said other fourteen highways was to destroy competition and favor the railroad lines, and the steamboat lines on the Columbia River (brief p. 12, P. R. 12).

The record discloses that such action of said Highway Commission has the effect of, forcing the appellants to either operate such trucks at a great and irreparable loss, or to go out of business on said FIFTEEN PRIMARY HIGHWAYS OF THE STATE. (brief pp. 8, 12, 13, 14, P. R. 9, 10, 12, 13, 14.)

The appellants cannot double their rates for carriage, as the Public Service Commission has informed them that such increased rates would be unjust and unreasonable. By law the appellants are compelled to file schedule of rates satisfactory to the Public Service Commission and without such permission the plaintiffs cannot operate their trucks. (brief p. 8, P. R. 9, 10.)

The effect of such order and said blanket order destroy the rights the appellants have to enjoy the use of said Federal aided highways in the same manner and with the same character of equipment as had been operated many years prior to the year 1920. This attempt of the State, acting under such order of the State Highway Commission, is just exactly as was foreseen by Congress and furnishes the conclusive rea-

son for the enactment of the "Federal Highway Act" of 1921.

We desire to call this Court's attention to one case which was not cited in our original brief. The State of Maryland chartered the Baltimore & Ohio Railroad Company, in which charter the railroad company agreed to pay a portion of its earnings to the State. The company endeavored to escape the payment of such charter contract. Your Court in passing upon the question held that such provision was constitutional and did not come within the constitutional restriction in connection with interstate commerce, and that the State had the undoubted right to exact such bonus and that the railroad company could add such amount on the fares charged and collected. On navigable waters the remedy would be competition, but on highways the Court said that the same kind of relief should avail. Mr. Justice Bradley in delivering the opinion of the Court said:

"Whether, in addition to this, Congress, under the power to establish post-roads, to regulate commerce with foreign nations, and among the several States, and to provide for the common defense and general welfare, has authority to establish and facilitate the means of communication between the different parts of the country, and thus to counteract the apprehended impediments referred to, is a question which has exercised the profoundest minds of the country. This power was formerly exercised in the construction of the Cumberland road and other similar works. It has more recently been exercised, though mostly on national territory, in the establishment of railroad communication with the Pacific coast. But it is to be hoped that no occasion will ever arise to call for any general exercise of such power, if it exists. It can hardly be supposed that individual States, as far as they have reserved or still possess the

power to interfere, will be so regardless of their own interests as to allow an obstructive policy to prevail. If, however, state institutions should so combine or become so consolidated and powerful as, under cover of irrevocable franchises already granted, to acquire absolute control over the transportation of the country and should exercise it injuriously to the public interest, every constitutional power of Congress would undoubtedly be invoked for relief. Some of the States are so situated as to put it in their power, or that of their transportation lines, to interpose formidable obstacles to the free movement of commerce of the country. Should any such system of exactions be established in these States, as materially to impede the passage of produce, merchandise or travel, from one part of the country to another, it is hardly to be supposed that the case is a *casus omissus* in the Constitution."

Balt. & Ohio R. R. Co. v. Maryland,
21 Wall, 456, 475. 22 L. ed. 678, 684.

Congress took no chances in the face of the attempts of the States to obtain financial benefits at the expense not only of the Federal Government, but of the public, who are the ultimate payers. The attempt of the State through the State Highway Commission was in line with the conduct of the same State in the construction of the present Columbia River Highway, as recited in the decisions of this Court. *Supra*.

IT IS ADMITTED THAT THE ONLY OBJECT THE STATE HIGHWAY COMMISSION HAD WAS TO ABSOLUTELY THROTTLE AND DESTROY COMPETITION ON FIFTEEN PRIMARY HIGHWAYS OF THE STATE, ALL FEDERAL AIDED, IN FAVOR OF THE RAILROAD LINES, AND THE STEAMBOAT LINES ON THE COLUMBIA RIVER.

Further it is admitted that these appellants are engaged in interstate commerce between the States of Oregon, Washington and Idaho, (brief p. 8, P. R. 9, 10) and are protected by the Commerce Clause of the Constitution of the United States.

It is further admitted that the Secretary of Agriculture has not in any way acted in connection with this attempt to override his sole authority in connection with the preservation and protection of such highways or insuring the safety of traffic thereon.

It is admitted that for the calendar year of 1925, the State Highway Commission only expended \$5,000.00 in the repair and maintenance of said portion of said Columbia River Highway, being 22.11 miles in length. (brief p. 12, P. R. 12.)

THE APPELLANTS WERE WILLING AND ABLE AND OFFERED TO FURNISH A GOOD AND SUFFICIENT BOND TO PAY ALL DAMAGES WHICH MIGHT ACCRUE BY THE OPERATION OF THEIR NINE TRUCKS BY REASON OF SUCH ADDITIONAL WEIGHT OVER 16,500 POUNDS. (brief p. 12, P. R. 12.)

IT IS ADMITTED THAT THE NINE TRUCKS LIMITED TO THE WEIGHT OF TRUCK AND LOAD OF 22,000 POUNDS WITH A SPEED OF 12 MILES PER HOUR HAS NOT DAMAGED OR DESTROYED THE SAID 22.11 MILES OF SAID HIGHWAY; AND THAT SUCH PORTION OF SAID HIGHWAY IS IN AS GOOD A CONDITION AS IT HAS BEEN FOR YEARS AND HAS NEVER BEEN AND IS NOT NOW BEING DAMAGED OR DESTROYED AS SET FORTH IN SAID ORDER, BY EITHER THE OPERATION OF SAID NINE TRUCKS. (brief p. 11, P. R. 11.)

THE APPELLEES ADMIT THAT SAID ORDER WAS NOT BASED UPON EITHER THE PRESENT DAMAGE OR DESTRUCTION OF SAID PORTION OF SAID HIGHWAY, AND ALSO THAT SAID PORTION OF SAID HIGHWAY WAS IN FIRST CLASS CONDITION AND REPAIR, AS WELL AS SAID OTHER PORTIONS OF SAID HIGHWAY. (brief p. 11, P. R. 12.)

The lower Court held that such order was to relieve an emergency and as soon as such emergency was relieved of, the order would fall, and that the only power that the State Highway Commission had was to protect the highway until the emergency had ceased.

No emergency ever existed. No mention is found in appellees' brief of any emergency. Yet the lower Court rested its entire decision on such condition and the appellees have repudiated the only foundation upon which the power to issue such order rests. That is an emergency. (See opinions P. R. 18-24).

We submit that the appellants are entitled to the relief prayed for.

Respectfully submitted,

W. R. CRAWFORD,
EDWIN C. EWING,
Solicitors of Appellants.

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NOV 29 1926

IN THE

WM. R. STANSBURY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1926

No. 372

R. B. MORRIS, doing business as MORRIS &
LOWTHER; H. M. HEWITT and LEW NUNA-
MAKER, doing business as JOHN DAY VALLEY
FREIGHT LINE; H. L. LIVINGSTON, doing
business as BEND-PORTLAND TRANSIT, and
PORTLAND-HOOD RIVER TRUCK LINE,
INC.,

Appellants,

vs.

WM. DUBY, H. B. VAN DUZER, and W. H. MA-
LONE, as the OREGON STATE HIGHWAY
COMMISSION,

Appellees.

*Appeal From the District Court of the United States
From the District of Oregon.*

MOTION TO VACATE DECREE AND
BRIEF IN SUPPORT

✓ W. R. CRAWFORD,
✓ EDWIN C. EWING,
Solicitors for Appellants.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1926

No. 372

R. B. MORRIS, doing business as MORRIS &
LOWTHER; H. M. HEWITT and LEW NUNA-
MAKER, doing business as JOHN DAY VALLEY
FREIGHT LINE; H. L. LIVINGSTON, doing
business as BEND-PORTLAND TRANSIT, and
PORTLAND-HOOD RIVER TRUCK LINE,
INC.,
Appellants,

v.s.

WM. DUBY, H. B. VAN DUZER, and W. H. MA-
LONE, as the OREGON STATE HIGHWAY
COMMISSION,
Appellees.

*Appeal From the District Court of the United States
From the District of Oregon.*

MOTION TO VACATE DECREE AND BRIEF IN SUPPORT

*To the Honorable, the Chief Justice and the Associate
Justices of the Supreme Court of the United
States:*

Come now the appellants in the above entitled
cause and move this Honorable Court to vacate that

certain decree made and entered October 29, 1926, in the above entitled cause and show as follows:

1.

That as shown by the transcript of record in this Court a judgment and decree was entered in the lower Court on March 20, 1926, and in which judgment and decree the defendants, now the appellees, recovered their costs and disbursement taxed in the sum of \$30.00 and the execution issue therefor. (P. R. 25, 26.)

That on said day proper appeal was prayed for and perfected to this Court. (P. R. 26, 27.)

That on said day, to-wit, March 20, 1926, the said order entered by the appellees herein reducing the combined weight of truck and load from 22,000 pounds, as shown in the record, was still in force and effect. (P. R. 3.)

It is shown that said order was entered by said appellees herein under and by virtue of the provisions of Sections 35 and 36 of the Law of Oregon 1921, and that the only power to so act by said appellees was claimed under such sections of said State Law. (P. R. 8.)

That the appellants received notice some time after April 1, 1926, that the said appellees had, after the appeal from the said judgment of the lower Court had been perfected herein, revoked the order of the said appellees in which the said combined weight of truck and load had been reduced from 22,000 pounds to 16,500 pounds, and in the answer to the petition for

a stay in the above entitled cause filed herein, it is alleged that on March 25, 1926, such order had been revoked, and such order also revoked all of the restrictions on the other 14 primary highways. Such order being made by said appellees 5 days after the appeal herein had been perfected, and jurisdiction vested in your Court.

The order in controversy herein showed that the said appellees acted under and by virtue of the laws of Oregon for 1921, as amended in 1921, Special Session, all as set out in said order, a copy of which is set out in full in the transcript of record herein. (P. R. 15-17.)

That on the 27th day of September, 1926, the briefs of the appellants herein were mailed at Seattle, Washington, to the Supreme Court in the above entitled cause, and at the same time briefs were mailed to the Attorney General at Salem, Oregon, in the above entitled cause.

That on the 28th day of September, 1926, the appellees herein, acting solely under the provisions of Sections 35 and 36 of the said State Law, as amended, did enter another order (which effects the same) 14 of the primary highways of the State, all Federal aided, restricting the use of motor trucks on certain portions of said highways, including the 22.11 miles on the Columbia River Highway between the East Multnomah County Line and Hood River, in which order the appellees reduced the combined weight of truck and load from 22,000 pounds to 16,500 pounds, but declared that such reduced weight should only affect trucks having solid tires, and permitted trucks with pneumatic tires to carry the legal combined weight of 22,000 pounds and with a speed of not over 18 miles per hour, while the speed of the same truck

with solid tires is limited to a speed of 12 miles per hour.

That these appellants and others, operating trucks with combined weight of truck and load of 22,000 pounds were and are compelled to use solid tires and pay the said 50 cents per inch on such tires, and such order, so made on September 28, 1926, was not made by reason of any emergency, but fixed a definite time of restriction, to-wit, from October 15, 1926, to April 15, 1927, and said order of said September 28, 1926, as far as these appellants are concerned, has the same force and effect as the said order complained of entered in 1925.

That the specifications of errors contained in the brief of appellants show that the principle questions for determination was the constitutionality of such provisions of the State Law, being Sections 35, 36, and 36A, and the order entered by the appellees in 1925 rested entirely upon the constitutionality of the law vesting the appellees with the jurisdiction and power to enter such order.

Also that interstate commerce was unconstitutionally burdened by such provisions of the said State Law as so administered. (Brief pp. 16, 17.)

So this Court will find that the appellants directly attacked the constitutionality of said Sections 35 and 36 of said State Law, in paragraph 11 of the argument. (Brief p. 30.)

The amended complaint attacked the constitutionality of said sections of said law. (P. R. 13, 15.)

Wherefore these appellants pray this Honorable Court to vacate and set aside the said order dismissing said appeal entered on the 29th day of October, 1926; and vacate the order and decree herein; and further these appellants again renew their application made for a Stay applied for in this Court on May 24, 1926; and for all proper and further relief in the premises.

W. R. CRAWFORD,

EDWIN C. EWING,

Solicitors for Appellants.

ARGUMENT

The record shows that the appellees, immediately after the appeal had been perfected to this Court, had entered an order revoking such order reducing the combined weight of truck and load. The appellants made application in May to this Court for a stay order, or the advancement of the hearing on the appeal. In answer to such petition the appellees filed an answer, and in such answer they show that their order had been revoked and desired the dismissal of the appeal.

As soon as the appellants had served the appellees with their brief, the appellees again made an order with the same force and effect as the order in 1925 which is set out in this cause as exhibit "A" to the amended complaint. Such new order was made September 28, 1926.

This Court on October 29, 1926, entered a decree dismissing the appeal with instructions to the lower Court to dismiss the bill of complaint on the ground that the case had become a moot one through the rescission of the assailed order of the Oregon State Highway Commission, with leave given appellants to move to vacate such decree.

This Court inadvertently overlooked the principle matter involved in the appeal. That is, that this action was instituted for the purpose of testing the constitutionality of Sections 35, 36, and 36A of the Law of 1921, as amended. The appellants made such question the material question, as without such provisions of said State law, the said State Highway Commission

had no power to enter the order of 1925. We consider that if there was nothing else contained in said amended bill of complaint, except the question of the constitutionality of said provisions of said State law, we are entitled to have this Court pass upon such question. This Court in its decree of dismissal only considered the revoking of the said order without considering the basis upon which said order was issued by the appellees.

Again, the appellees themselves have endeavored to prevent a review of the constitutionality of said Sections 35 and 36 of the Laws of 1921, as amended, by revoking their order after the appeal had been perfected to this Court, and thereafter praying this Court to dismiss such appeal, and then on September 28, 1926, the appellees entered another order and again reduced the said combined weight of trucks and loads of these appellants and others, and these appellants are in the same position they were in when said appeal was perfected on March 20, 1926. We venture to say that if we should institute another action similar to the one instituted by these appellants in the fall of 1925, and the matter should come on for hearing, and if these appellants would perfect an appeal, these appellees would again revoke such order made this year, and again this Court would be asked to dismiss the appeal as a moot one.

Fortunately, your Court has had the opportunity to examine into situations of this kind, and we call this Court's attention to the following cases:

This Court in its opinion delivered by Mr. Justice Peckham said:

“As to the first ground, we think the fact of the dissolution of the association does not prevent this court from taking cognizance of the appeal and

deciding the case upon its merits. The prayer of the bill filed in this suit asks, not only for the dissolution of the association, but, among other things, that the defendants should be restrained from continuing in a like combination, and that they should be enjoined from further conspiring, agreeing, or combining and acting together to maintain rules and regulations and rates for carrying freight upon their several lines, etc. The mere dissolution of the association is not the most important object of this litigation. The judgment of this court is sought upon the question of the legality of the agreement itself for the carrying out of which the association was formed, and if such agreement be declared to be illegal, the court is asked, not only to dissolve the association named in the bill, but that the defendants should be enjoined for the future. * * * *

As an answer to the fact of the dissolution of the association, it is shown on the part of the government that these very defendants, or most of them, immediately entered into a substantially similar agreement, which is to remain in force for a certain time, and upon which the companies acted, and in regard to which it does not appear that they are not still acting.

If the mere dissolution of the association worked an abatement of the suit as to all the defendants, as is the claim made on their part, it is plain that they have thus discovered an effectual means to prevent the judgment of this court being given upon the question really involved in the case. The defendants have succeeded in the court below, it would only be necessary thereafter to dissolve their association and instantly form another of a

similar kind, and the fact of the dissolution would prevent an appeal to this court or procure its dismissal if taken. This result does not and ought not to follow.

United States v. Trans-Missouri Freight Association, 166 U. S. 290, 308, 41 L. ed. 1007, 1016.

Again, this Court announced the same principle in the opinion delivered by Mr. Justice McKenna:

"But in those cases the acts sought to be enjoined had been completely executed, and there was nothing that the judgment of the court, if the suits had been entertained, could have affected. The case at bar comes within the rule announced in *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290, 308, 41 L. ed. 1007, 1016, 17 Sup. Ct. Rep. 540, and *Boise City Irrig. & Land Co. v. Clark* (C. C. App. 9th C.) 65 C. C. A. 399, 131 Fed. 415.

In the case at bar the order of the Commission may to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings. But there is a broader consideration. The question involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar), and these considerations ought not to be, as they might be, defeated, by short-term orders, capable of repetition, yet evading review, and at one time the government, and at another time the carriers, have their rights determined by the Commission without a chance of redress."

Southern Pacific Terminal Company v. Interstate Commerce Commission, 219 U. S. 498, 515, 55 L. ed. 310, 316.

Further Mr. Chief Justice Taft said in delivering the opinion in the following case:

"The second ground urged for dismissal is that the tax for 1919, sought to be enjoined, has been collected from the taxpayers of the City by the Treasurer of the Commonwealth, so that the case has become a moot one. But the tax had been paid before the Supreme Judicial Court took up, considered, and decided the case. It must, therefore, have found, as it was entirely justified in doing, that the bill, in its averments, prayer, and real object was directed not only against the collection of the tax pending, but against future payments out of the treasury of the commonwealth, and against the continued operation of the Trustees under the Statute of 1918."

Boston v. Jackson, 260 U. S. 275, 313, 67 L. ed. 274, 281.

Mr. Justice Holmes said, in delivering the opinion of this Court:

"Perhaps it should be added to the foregoing statement that the bill was filed in September, 1902, and alleged the plaintiff's desire to vote at an election coming off in November. This election has gone by, so that it is impossible to give specific relief with regard to that. But we are not prepared to dismiss the bill or the appeal on that ground, because to be enabled to cast a vote in that election is not, as in *Mills v. Green*, 159 U. S. 651, 657, 40 L. ed. 293, 295, 16 Sup. Ct. Rep. 132, the whole object of the bill. It is not even the principal object of the relief sought by the plaintiff."

Giles v. Harris, 189 U. S. 474, 484, 47 L. ed. 909, 911.

We earnestly pray that this Court should vacate the decree of dismissal, and the constitutionality of such provisions of said State law should be decided, and in addition that from the record presented in this Court, the appellees should be restrained from proceeding in any manner under Sections 35 and 36 of said law of 1921, as amended, until the final determination of the constitutionality of such sections of said law; and for such proper relief in the premises.

Respectfully submitted,

W. R. CRAWFORD,

EDWIN C. EWING,

Solicitors for Appellants.

FILE COPY

DEC 30 1926

WM. H. STANSBURY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 372

R. B. MORRIS, doing business as MORRIS & LOWTHER; H. M. HEWITT and LEW NUNAMAKER, doing business as JOHN DAY VALLEY FREIGHT LINE; H. L. LIVINGSTON, doing business as BEND-PORTLAND TRANSIT, and PORTLAND-HOOD RIVER TRUCK LINE, INC., Appellants,

vs.

WM. DUBY, H. B. VAN DUZER, and W. H. MALONE, as the OREGON STATE HIGHWAY COMMISSION, Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

REPLY BRIEF OF APPELLANTS

W. R. CRAWFORD,
EDWIN C. EWING,

Solicitors for Appellants.

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 372

R. B. MORRIS, doing business as MORRIS & LOWTHER; H. M. HEWITT and LEW NUNAMAKER, doing business as JOHN DAY VALLEY FREIGHT LINE; H. L. LIVINGSTON, doing business as BEND-PORTLAND TRANSIT, and PORTLAND-HOOD RIVER TRUCK LINE, INC., Appellants,

vs.

WM. DUBY, H. B. VAN DUZER, and W. H. MALONE, as the OREGON STATE HIGHWAY COMMISSION, Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

REPLY BRIEF OF APPELLANTS

STATEMENT AND ARGUMENT

The appellees have presented an answer to the Motion to Vavate the Decree entered by this Court on October 29, 1926.

It is admitted that on September 28, 1926, the said appellees made and entered an order which directly affected these appellants, as well as others on thirteen other Federal Aided Highways. It is admitted that such order was made under and pursuant of Sections

35 and 36 of Chapter 371 of the Laws of Oregon, as amended, and that: "From the 15th day of October, 1926, to the 15th day of April, 1927, and the said rules, regulations and findings shall govern traffic operations over and upon the following named state highways, to-wit:" (Being named portions of said Federal Highways affected, including the portion of the Columbia River Highway between the East Multnomah County Line and Hood River, a distance of 22.11 miles, being the same portions as were affected by the order entered in 1925.)

This order of September 28, 1926, is set out as Exhibit "B," page 12, of said appellees' answer.

This Court can see that this new order of September 28, 1926, was to go into force and effect on October 15, 1926, ten days before the hearing of this appeal on October 25, 1926. So that at the time of the hearing these appellants were and had since October 15, 1926, been compelled to and are being compelled to suffer the same daily loss and damage by the same order as they suffered by the order of 1925, all as shown in the records and the briefs of appellants.

This new order of 1926 is only a subterfuge, in order to mislead the Courts.

If for instance, it would be possible to obtain large enough pneumatic tires, the appellants instead of being restricted to 12 miles per hour with a combined load of 22,000 pounds, would be entitled to the statutory speed of 18 miles per hour. The absurdity of such a situation is apparent to this Court. (We call attention to page 68 in the appendix of the brief of appellants on the question of speed of trucks. An error was made in the provision regarding speed, and it should read as reversed, from pneumatic tires to solid tires.)

There is no attempt, and there could be no attempt, to deny the statements contained in our motion to vacate, to the effect that the appellants are in the same position, as they were in under the provisions of the order made in 1925.

We call the Court's attention to this present order and the opinions of the District Court upon which the motions to deny the injunctions were granted and the final decree entered in such cause.

Judge Wolverton, in delivering the opinion of the District Court, said:

"The legislature having this power, it also had the power to delegate to the State Highway Commission the authority in cases of emergency to reduce the carrying weight of trucks until the emergency was relieved against. This is all the commission attempted and is attempting to do in the present case. The order of the commission is temporary, not permanent, it reading "until revoked or modified." (P. R. 22.)

Appellants in Par. V., in the argument in their brief, raised the question of the emergency of such order, as there was absolutely no emergency shown. But the following situation has developed by this order of September 28, 1926. No longer is there any fancied emergency even, as under the decision of the District Court the provision "until revoked or modified" has been eliminated and a fixed period of six months from October 15, 1926, to April 15, 1927. So that there is not even a suggestion of an emergency upon which the District Court acted in denying injunctive relief and dismissing the cause.

Therefore, as was contended by these appellants in their brief, the said actions of the said State Highway Commission could not be sustained under the old

order, and under the new order there could be no defense, as there has been a period fixed of six months, in which the appellants have already suffered and will continue to suffer in their business, etc., under a pretended emergency. In other words, the admitted facts show that the object of the appellees is to destroy the operation of trucks in competition with the railroad and steamship lines. It must be understood that all the portions of the highways affected by the order of September 28, 1926, are all Federal Aided Highways, and such highways are parallel to railroad or steamship lines, or both. All of such matters were set out in the amended bill of complaint and were and are admitted to be the facts.

We earnestly request this Court to set aside its decree of October 29, 1926, and grant the relief which was prayed for in the amended bill of complaint, and for other and proper relief in the premises.

We refer to the records and briefs on file, which have already been presented to this Court on the hearing of this appeal on October 25, 1926.

Respectfully submitted,

W. R. CRAWFORD,
EDWIN C. EWING,
Solicitors for Appellants.

No. 1268

372

MAY 24 1925

WM. R. STANSON

In the Supreme Court of the United States

OCTOBER TERM, 1925

R. B. MORRIS, doing business as Morris & Lowther; H. E. HEWITT and LEW NUNAMAKER, doing business as John Day Valley Freight Line; H. L. LIVINGSTON, doing business as Bend-Portland Transit; and PORTLAND-HOOD RIVER TRUCK LINE, Inc.,

Appellants,

vs.

WILLIAM DUBY, H. B. VAN DUZER and W. H. MALONE,
as the Oregon State Highway Commission,

Appellees.

No.

Answer to Petition for a Stay

*On Appeal from the District Court of the United States
for the District of Oregon*

I. H. VAN WINKLE,
Attorney-General for the State of Oregon,

J. M. JEFFERS,
Assistant Attorney-General for the State of Oregon,
Counsel for Appellees.

W. E. CRAWFORD,
EDWIN C. EWING,

Counsel for Appellants.

In the Supreme Court of the United States

OCTOBER TERM, 1925

R. B. MORRIS, doing business as Morris & Lowther; H. E. HEWITT and LEW NUNAMAKER, doing business as John Day Valley Freight Line; H. L. LIVINGSTON, doing business as Bend-Portland Transit; and PORTLAND-HOOD RIVER TRUCK LINE, Inc.,

Appellants,

vs.

WILLIAM DUBY, H. B. VAN DUZER and W. H. MALONE,
as the Oregon State Highway Commission,

Appellees.

No.

Answer to Petition for a Stay

*On Appeal from the District Court of the United States
for the District of Oregon*

*To the Honorable, the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

Come now William Duby, H. B. Van Duzer and W. H. Malone, appearing as the Oregon State Highway Commission, the appellees above named, and for their answer and the answer of each of them to the petition for a stay filed by the appellants in the above-entitled court and cause, admit, deny and allege as follows:

I

These appellees say that they have no knowledge, information or belief save such as is disclosed in said petition,

that the petitioners have been or now are all owners and operators of motor trucks carrying freight and express as common carriers between Portland, Oregon, and The Dalles, Oregon, and points beyond on the Columbia River Highway, or that said petitioners have been or now are carrying on interstate commerce between the states of Oregon and Washington; and, therefore, as to all such matters these appellees leave petitioners to make due proof thereof.

II

These appellees, constituting the Oregon State Highway Commission, admit that as such State Highway Commission they issued a certain order to take effect October 1, 1925, by which order they limited the gross weight of truck and load permitted upon a certain portion of the Columbia River Highway to 16,500 pounds.

III

These appellees admit that the appellants herein instituted a certain suit in the district court of the United States for the district of Oregon, seeking to obtain a permanent injunction against the State Highway Commission restraining it from limiting said gross weight as aforesaid and praying for a temporary injunction until final hearing and determination of said case.

IV

These appellees admit that such application was heard before the said district court consisting of three judges, one of whom was a circuit judge; that after such application had been denied an amended bill of complaint was filed after consent of the court had been obtained. A new application for a temporary injunction was presented and heard by said district court, consisting of the same three

judges, and that said application on said amended complaint was denied, and that the motion to dismiss, which motion was filed by these appellees, was granted; that upon failure and refusal of appellants to amend or further plead the cause itself was ordered dismissed and a final decree entered in accordance with such order.

V

These appellees admit that the ground upon which said district court denied the application for a temporary injunction upon said amended bill of complaint, and the ground upon which said cause was dismissed, was in general that the State Highway Commission was and is vested with the authority and jurisdiction by the laws of the state of Oregon to fix limitations of the gross weight of truck and load.

VI

These appellees admit that the appellants herein appealed from the decree of the district court denying their said application for a temporary injunction and from the decree dismissing said cause, and admit that such cause is now docketed in this court.

VII

For answer to the several grounds set forth in the appellants' petition for a stay these appellees allege as follows:

(1) For answer to the declaration of the appellants to the effect that all the allegations in their amended bill of complaint for a temporary injunction were admitted as true by these appellees, it is alleged that any admission as to the truth of such allegations was only such admission as follows as the result of the motion to dismiss filed by these appellees in the district court.

(2) Appellees admit that the order made by the Oregon State Highway Commission diminished or decreased the weight of load and truck from the statutory allowable limit of 22,000 pounds to 16,500 pounds, but in this connection these appellees allege that such order was made pursuant to statutory authority vested in the State Highway Commission by the Oregon state legislature. These appellees admit further such order related to only a portion of the Columbia River Highway, to wit: that portion between the east boundary line of Multnomah county and the west boundary of the corporate limits of the city of Hood River, a distance of approximately 22 miles.

(3) These appellees allege that they have no knowledge, information or belief, save as is disclosed in appellants' petition, as to whether or not it is true that the petitioner, Morris, has been operating his trucks for more than four and one-half years from Portland on said Columbia River Highway, through the portion affected by said order to The Dalles, or that the said petitioners have been so operating prior to said order for various periods, or that long prior to said October 1, 1925, the petitioners purchased trucks weighing from 11,500 pounds to 12,500 pounds; or that petitioners were compelled or that they have paid the highest license fees on their capacity trucks or the charge estimated upon tire width, and as to these matters these appellees leave the appellants to make due proof thereof.

(4) These appellees allege that they have no information, knowledge or belief, save such as is disclosed by the petition of appellants, with respect to the truth of the allegations that petitioners were required to file with the Public Service Commission schedules of operations and tariffs, or that they have done so, or that such schedules

so filed have been adopted by the Public Service Commission of the state of Oregon as just and reasonable, or that the Public Service Commission has informed the petitioners that an increase in said tariffs will not be permitted or that the petitioners adopted such tariffs based upon the capacity load of their said trucks, to wit: a maximum weight of truck and load of 22,000 pounds, or that the said order decreasing the gross maximum weight of truck and load to 16,500 pounds would damage or destroy petitioners' business; and, therefore, as to these matters these appellees leave appellants to make due proof thereof.

(5) Appellees admit that the said order made by the Oregon State Highway Commission and now challenged by the appellants, was made without notice, but allege that the same was made within the purview and provisions of the Oregon statute, and that thereafter notice of such order was given as required by the Oregon statute. These appellees deny that said order was arbitrarily made, or that the same was unreasonable. These appellees deny that the said portion of said Columbia River Highway had been built many years prior to the portion of said highway extending from the east line of Multnomah county to Portland, Oregon, and deny that the portion of said Columbia River Highway from Hood River city to The Dalles had been constructed at the same time as the portion of said highway between Hood River city and the east line of Multnomah county. These appellees admit that the portion of the Columbia River Highway affected by the commission's order was built—not prior to 1920, but during the year 1920; but these appellees deny that said road has been reconstructed, widened, improved or maintained with federal aid funds. These appellees admit that the said portion of said highway affected by said order is in a fair condition of repair, but allege that the state of Oregon has expended in the maintenance and upkeep of

said section of said highway since 1920, the sum of \$209,159.05, or approximately \$9,464 per mile for each of the 22.11 miles affected by said order. These appellees admit that steamboat lines and railroad lines parallel that portion of the Columbia River Highway affected by the commission's order. These appellees admit that a similar order was made reducing the maximum weight of truck and load from 22,000 pounds to 16,500 pounds, and that said order was made effective with respect to many of the public highways of the state. These appellees allege that the allegation made by the appellants to the effect that said highway is not being damaged by the operation of their trucks is not true. With respect to the allegations that petitioners operate only nine trucks of a capacity affected by the commission's order, and the allegations with respect to the effect which the activities of the petitions have had upon the business of the activities of railroad and steamboat lines, these appellees have no knowledge, information or belief, save as is disclosed in the petition as to whether or not such allegations are true, and, therefore, they leave appellants to make due proof thereof.

Further answering, these appellees deny that said order was made in the interest of the steamboat lines or the railroad lines, or that the same was made to destroy competition furnished by motor trucks, and allege that the occasion and purpose of said order was the preservation of said highway.

(6) Answering further, these appellees deny that the property of petitioners was taken without due process of law, but appellees allege that they have no knowledge, information or belief, save as is disclosed by said petition, with respect to the truth of the allegations that appellants had paid for the privilege of operating a truck of maximum gross weight upon said section of said highway, or

that their business would be destroyed by reason of said order, or that they would be required to purchase additional equipment, or that the freight rates would be changed or modified in any way, or that the petitioners or others operating out of Portland have constructed a freight terminal at Portland at a cost of \$250,000 for the purpose of handling freight in and out of Portland, or that to such terminal many hundreds of tons of freight are handled, or that said order will result in bankruptcy for said petitioners or others operating motor trucks; and as to these matters these appellees leave the appellants to make due proof thereof.

(7) Further answering, these appellees allege that the order challenged was made pursuant to the provisions of section 36, chapter 371, General Laws of Oregon, 1921, as amended by chapter 10, General Laws of Oregon, 1921, special session, and as amended by chapter 145, General Laws of Oregon, 1923; and, therefore, these appellees allege that the declaration in the petition of the appellants to the effect that said Highway Commission is or was without authority to make said order is not true.

(8) Further answering, these appellees deny the allegation that the said order was issued for the sole purpose of destroying competition, and alleged the fact to be that the said order was made for the sole and only purpose of preserving the public highway against damage being done by the heavy truck traffic to which said highway was being subjected by the appellants and others similarly engaged.

(9) These appellees deny that the petitioners are protected under the federal-aided highway legislation, and deny that either the provisions of the laws of the state of Oregon or the acts of Congress surround the petitioners with any protection against the order or act of the Oregon State Highway Commission.

(10) Answering further, these appellees deny that the appellants were or are protected either by state statute or federal law against the order of the commission, and deny that they are entitled to operate their said motor trucks with a gross maximum weight of truck and load of 22,000 pounds contrary to the order of said commission, and deny that the said portion of said highway was constructed or reconstructed pursuant to specifications which will withstand during all seasons of the year the character of traffic to which petitioners and those similarly engaged seek to subject said road, and deny that the said portion of said highway affected by said order was subjected to the use of only four trucks during 1922, of a maximum capacity, and deny that the number of trucks of such capacity operating upon said highway were limited to nine of a maximum capacity; and deny that the said order discriminates against the trucks of said petitioners in favor of the owners and operators of bus lines, and deny that the said order in any way becomes an unlawful burden upon interstate commerce.

(11) Further answering, these appellees deny that the portion of said highway affected by said order required for maintenance the sum of only \$5,000, but alleged the fact to be as heretofore stated, that since 1920 the state has been required to expend on said 22.11 miles the sum of \$209,159.05, and that during the year 1923 there was expended upon said section of said highway \$1,227 per mile, or a total of \$27,117.45; and allege further that as a result of the heavy traffic to which said road has been and is being subjected large portions of the pavement are continually breaking down, with the result that during the years 1924 and 1925 it became necessary to expend for the repair and renewal of said pavement the sum of approximately \$23,000, or \$1,041 per mile. These appellees

deny that a bond in the sum of \$5,000 would be sufficient to protect the public and compensate the state for the loss which it will sustain if the activities of petitioners are in no way to be controlled or restrained by the State Highway Commission, and allege that said sum of \$5,000 is wholly inadequate.

(12) These appellees deny that the petitioners are entitled to protection against the order of the commission, and deny that the commerce clause of the constitution of the United States, the fourteenth amendment thereof, or that any contract between the federal government and the state of Oregon is being violated or in any way wronged or offended by the said order of the Oregon State Highway Commission; and deny that the petitioners will be in any way wrongfully or unlawfully damaged or injured either in their property or business by reason of the acceptance of the Oregon State Highway Commission of the order challenged. These appellees further answering, deny that the appellants are entitled to a temporary restraining order or to any relief under their said petition.

As a further and separate answer, reply and defense to said application for a stay these appellees allege the following facts:

I

That under and by virtue of chapter 237, General Laws of Oregon, 1917, by reference to which said chapter the same is now made a part of this answer, the Oregon state legislature created the Oregon State Highway Commission, which said commission is in this proceeding represented by the appellees herein named, and that under and by virtue of said law the said Highway Commission was authorized, empowered and directed to construct and maintain a system of state highways.

II

That under and by virtue of chapter 423, General Laws of Oregon, 1917, by reference to which said chapter the same is now made a part of this answer, the Oregon state legislature designated and created a system of state highways, among which state highways is the portion of the Columbia River Highway affected by the order of the commission, which order is challenged in these proceedings by the said appellants. By the provisions of said last named law the Oregon State Highway Commission was again authorized, directed and empowered to construct and maintain the said highways, including the section of the Columbia River Highway now under dispute.

III

That under and by virtue of the provisions of chapter 371, General Laws of Oregon, 1921, as amended by chapter 145, General Laws of Oregon, 1923, by reference to which said chapters the same are now made a part of this answer, the Oregon state legislature enacted what is known as the Oregon motor vehicle law, which law provides for the licensing and regulation of vehicles using the public highways of the state; that section 36 of said chapter 371 of the Laws of 1921, as amended by chapter 145 of the General Laws of Oregon, 1923, authorizes, empowers and directs the Oregon State Highway Commission to reduce the maximum load limit of truck and load below the limit specified in said act whenever in the judgment of the Highway Commission such action is necessary for the preservation of a state highway or any part thereof.

IV

That pursuant to said state statutes the State Highway Commission on the 28th day of August, 1925, made and entered of record an order reducing the load limit permitted upon the section of the Columbia River Highway now in dispute from a maximum of 22,000 pounds to 16,500 pounds, which said order, omitting the title, was in words and figures as follows:

Whereas, the Columbia River highway between the east boundary of Multnomah county and the west limits of the city of Hood River has been designated and declared to be and is a state highway and has been improved and is being maintained by the State Highway Commission pursuant to the laws of the State of Oregon as a state highway; and

Whereas, the above named state highway in the judgment of the State Highway Commission is being subjected to a kind and character of traffic which is damaging and injuring said highway and in order to protect said highway against such damage and injury, it is deemed and is the judgment of the Highway Commission and said commission finds that it will be for the best interests of said highway that the maximum weights now permitted and authorized by law be reduced; and

Whereas, the State Highway Commission has after due investigation determined and found, and it is the judgment of the commission, that the maximum weights which shall be permitted upon the said road shall be reduced and fixed as in this order provided.

Now, therefore, the premises being in part as above stated, and the State Highway Commission having as a result of due investigation found and does find that said road is being damaged and injured on account of the kind and character of traffic now being hauled over and upon said road, and by reason of the fact that loads of the maximum weight moved at the maximum speeds specified by the provisions of the laws of the state of Oregon are

breaking up, damaging and deteriorating the said road, and the commission having found and does find upon due investigation that it will be for the best interests of the said state highway that the maximum weight of load permitted upon said road shall be reduced from 22,000 pounds to 16,500 pounds, and that the maximum weight of 600 pounds per inch for tires having a width in excess of 30 inches shall be reduced to 450 pounds per inch of tire width, and that the maximum allowable load for tires having a width of less than 30 inches shall be reduced from 500 pounds per inch width of tire to 375 pounds per inch width of tire;

It is hereby ordered, that the maximum weight of combined load and vehicle which shall be permitted upon said road shall not exceed 16,500 pounds, and that on any vehicle having a total tire width of less than 30 inches the concentrated weight in pounds bearing on the surface of the highway at contact with the tread of the two wheels of any one axle of such vehicle shall not exceed the product of the sum of the tire widths of the two wheels of such axle multiplied by 375 pounds; and on any vehicle having a total tire width of 30 inches or more than 30 inches the concentrated weight in pounds bearing on the surface of the highway at contact with the tread of the two wheels of any one axle of such vehicle shall not exceed the product of the sum of the tire widths of the two wheels of such axle multiplied by 450 pounds.

It is further ordered, that these rules and regulations as made and found by the State Highway Commission under the provisions of chapter 371 of the Laws of Oregon for 1921, as amended by chapter 8 of the General Laws of Oregon, 1921 Special Session, shall be in full force and effect from and after October 1, 1925, until revoked or modified by the State Highway Commission.

And it is further ordered, that a notice be posted in a conspicuous manner and place at each end of said highway, and at every cross-roads, so that said notice can be readily seen and read, which said notice shall state plainly the limitations and prohibitions of traffic hereby in this order determined and fixed.

And be it further ordered, that a certified copy of this order be furnished to the county clerk of Hood River county, and that a certified copy of said order be furnished the Secretary of State for the information of the chief of the Traffic Enforcement Division.

Dated this twenty-eighth day of August, 1925.

OREGON STATE HIGHWAY COMMISSION,

By Wm. Duby, Chairman,
H. B. Van Duzer, Commissioner,
W. H. Malone, Commissioner.

Attest:

Roy A. Klein,
State Highway Engineer and Secretary.

V

That said order, as is disclosed from the contents thereof, went into effect October 1, 1925, and was to remain in effect until revoked or modified by the State Highway Commission.

VI

That the appellants in this suit challenged the validity of said order in the district court of the United States for the district of Oregon, and asked for a temporary restraining order, and ultimately for a permanent injunction. Said application was heard as required by law by three judges, and was denied. Thereafter the appellants, with the permission of the court, filed an amended complaint and renewed their application for a temporary restraining order. Said application was heard by the court and again denied, and on motion of these appellees the complaint was dismissed, and upon failure of the appellants to further plead the cause was dismissed, from which order or orders the appellants have appealed to the above-entitled court.

VII

The application for a temporary restraining order, based upon the original complaint, was heard by Honorable William B. Gilbert, judge of the United States court of appeals, ninth district, and the Honorable Charles E. Wolverton and the Honorable Robert S. Bean, judges of the district court of the United States for the district of Oregon, and in denying the said application the court in the opinion written by Judge Wolverton, said:

It is not questioned that the section of the Columbia River highway concerned in the present controversy is a rural post road within the purview of the federal statutes applicable, and it can hardly be disputed that the State Highway Commission exercises, by delegation from the state police powers in so far as it pertains to the maintenance of the state highways in proper condition and repair for the protection and general welfare of the public. (*Hendrick v. Maryland*, 235 U. S. 610, 622.)

It is the chief contention of counsel for plaintiffs that the federal enactments by which aid by the general government was extended to the several states for the construction and maintenance of highways within the states, and the acceptance thereof by the State of Oregon as required by Congress, constitute a contract which the state is bound to observe, and from which it can not withdraw, and that such contract is one which inures to the benefit of the users of the highways, and which they are at liberty to invoke for the protection of their respective rights and privileges. Whether such correlative legislation can be termed a contract or not, it does constitute a legal status from which the state can neither withdraw nor alter, modify or qualify, without the consent or cooperation of Congress, and individuals, when their rights and privileges depending upon such joint and concurrent legislation, are trespassed upon, undoubtedly are entitled to have their relief in a proper form.

But it may be justly questioned whether the action of the legislature of the state fixing, as it did in 1921,

the maximum load weight of trucks used upon the highway at 22,000 pounds, is or constituted a part of that concurrent legislation. We are persuaded that it does not. The statute (being chapter 371, General Laws of Oregon, 1921) was enacted, as its title signifies, "for regulating the use, registration, licensing, taxing, identification, conduct and operation of vehicles and bicycles in the state of Oregon, and for the protection of same; * * *" providing for punishment for violation of this act; prohibiting the unauthorized use or possession of a vehicle," etc., and the matter respecting the maximum load weight to be carried by trucks is plainly germane to the subject embraced by the title. It does not relate to any matter within the purview of the joint and concurrent legislation of Congress and the state respecting the construction and maintenance of rural post roads.

There is no constitutional or legal reason why the state legislature might not at the time have made the maximum truck-load less than 22,000 so that it did not make it so low as practically to rule trucks off the highway, which would raise a legislative question involving discretion touching the reasonableness of the provisions of the act.

The legislature having this power, it also had the power to delegate to the State Highway Commission the authority in cases of emergency to reduce the carrying weight of trucks until the emergency was relieved against. This is all the commission attempted and is attempting to do in the present case. The order of the commission is temporary, not permanent, it reading "until revoked or modified."

The construction and reconstruction of the highways is required to be undertaken, and the work and labor in each state to be done, in accordance with its laws, and under the direct supervision of its highway department, and it is made the duty of the states to maintain the roads constructed according to their respective laws; but should the state fail to properly maintain any highway within its boundaries, the Secretary of Agriculture is authorized, upon giving proper notice, to proceed immediately to place

the same in proper condition. This is a burden imposed upon the general government, and users of the highway have no right or authority to compel the repairs. The government itself will come to their relief if exigency requires. Economically, highways, if falling into decay or disorder, should be protected until repaired or reconstructed, and the act of the state legislative assembly of 1921 recognizes this principle.

Another objection is interposed to the order of the Highway Commission, which is that it was issued without notice to the plaintiffs. This objection is without merit. The public is not entitled to notice of the commission's intention as respects every move it purposes making for the protection of the highway.

Plaintiffs further complain that the commission has failed to keep the highway in proper repair, and that its default in this respect is what has necessitated the order complained of; but that, as we have seen, is a matter for the general government, and not for the public.

In view of these considerations, it must follow that plaintiffs are not entitled to the preliminary restraining order as prayed, and from what has been said it is also apparent that the motion to dismiss should be sustained.

Let orders be entered accordingly.

VIII

When the application of the appellants, based upon their amended complaint, was again heard it was heard by the same three judges, with the result that the application was again denied. The opinion of the court at that time was written by Judge Bean, and is as follows:

After the motion for a preliminary injunction had been denied, plaintiffs, by permission of the court, filed an amended bill, which is substantially the same as the original with the added averments that the highway in question has been permanently constructed; that the plaintiffs are engaged in traffic over it; that they are and have been delivering freight at their termini, Portland and The

Dalles (both in this state), to motor trucks for carriage in and out of the state as a continuous service; that the order of the commission limiting the weight of load and vehicle makes it impossible for them to compete with the railroad which parallels the highway.

The effect of the federal and state highway legislation is considered in the opinion heretofore filed, and we are not disposed to depart from or modify the views therein expressed. In our opinion, the added averments do not entitle the plaintiffs to the relief asked. The state has paramount control over the use of the highways within its border, and it may enact and enforce reasonable regulations governing the traffic over them, necessary to secure their preservation and maintenance, and the public safety. (13 R. E. L., § 212; *Grand Trunk Western Ry. v. South Bend*, 227 U. S. 544.) The highways of the state are, of course, open to intrastate and interstate commerce alike, and the state can not, under the guise of legislation, deny one engaged in interstate commerce the use of its highways. (*Buck v. Kuykendall*, 267 U. S. 307.) But in the absence of national legislation covering the subject, the state may rightfully prescribe uniform regulation adapted to promote safety upon its highways, and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens. (*Hendrick v. Maryland*, 235 U. S. 610; *Kane v. New Jersey*, 242 U. S. 160.) If the state is impotent to protect its highways from destruction by excessively loaded trucks because, forsooth, they may be carrying interstate freight, it is difficult to understand how its right to regulate the speed or movement of such vehicles, or others carrying interstate passengers, can be supported.

The order of the highway commission complained of is not a discrimination against those engaged in interstate carriage or denying them the equal protection of the law. On the contrary, it puts all carriers by trucks on an equality.

The application for preliminary injunction is therefore denied, and in view of the provisions of section 266 of the Judicial Code, as amended in February, 1925, the motion to dismiss the complaint will be sustained.

IX

These appellees further answering the application for a stay, allege that the order made by the State Highway Commission was made for the purpose of protecting the public highway against the damage which was being done by the appellants and others similarly engaged, and was directed not only at the appellants, but, as is disclosed from the order itself, was directed to the public at large; that said order was temporary and was made for the purpose of protecting the highway during the rainy season; that the court in its order denying the application for a temporary restraining order, noted and directed attention to the fact that said order was temporary and not permanent, and as further evidence of that fact it is alleged that the appellees herein named, at their regular meeting held in Portland, Oregon, on March 25, 1926, by an order entered in its minutes, revoked the order challenged by these appellants and by which the maximum load limit was reduced upon the section of the Columbia River Highway now in dispute, and said order is not now and has not been since April 1, 1926, in effect; that the order of the commission revoking its previous order reducing the load limit on said highway is entered at page 1977 of volume 10 of the records and minutes of the Oregon State Highway Commission, and reads as follows: "On motion which was carried, the commission authorized the removal of load limitations on the following highways, effective April 1, 1926: Columbia River Highway between the Multnomah county line and Hood River." Then follows a list of the other highways affected by the orders of the commission by which maximum load limits were reduced. It is manifest, therefore, that appellants are seeking a stay of an order not now in effect.

Wherefore, by reason of the premises these appellees are informed and advised, and respectfully submit, that

the appellants are not entitled to a stay as prayed for, or to any remedy or relief by way of an injunction or otherwise, but these appellees aver on the contrary that the said petition is unfounded, is contrary to law, equity and conscience; and these appellees, having fully answered the matters and things set forth in said petition, pray that said petition and cause be dismissed, and that appellees have their reasonable costs.

I. H. VAN WINKLE,

Attorney-General for the State of Oregon,

J. M. DEVERS,

Assistant Attorney-General for the State of Oregon,

Counsel for Appellees.

Attest:

ROY A. KLEIN,

Secretary to Oregon State Highway Commission.

State of Oregon, }
 County of Marion, } ss.

I, Roy A. Klein, make oath and say, that I am secretary to the Oregon State Highway Commission, appellees in the foregoing answer; that I have read the above answer by me subscribed on behalf of said commission; that I have authority to affix the name of said commission thereto, and that the contents of said answer are true, excepting the matters therein stated on information and belief, and, as to those matters, I believe them to be true.

Subscribed and sworn to before me this 18th day of May, 1926.

Notary Public for Oregon.
 My commission expires May 9, 1928.



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FILED

OCT 19 1926

WM. R. STANBRO
CL

Supreme Court of the United States

OCTOBER TERM, 1926

No. 372

R. B. MORRIS, doing business as Morris & Lowther;
H. M. HEWITT and LEW NUNAMAKER,
Etc., et al.,

Appellants,

vs.

WM. DUBY, H. B. VAN DUZER, and W. H.
MALONE, Etc.,

Appellees.

*Appeal from the District Court of the United States
for the District of Oregon*

Brief of Appellees

✓ I. H. VAN WINKLE,
Attorney-General
of the State of Oregon,
✓ J. M. DEVERS,
Assistant Attorney-General
of the State of Oregon,
Solicitors for Appellees.

W. R. CRAWFORD,
EDWIN C. FWING,
Solicitors for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 372

R. B. MORRIS, doing business as Morris & Lowther;
H. M. HEWITT and LEW NUNAMAKER,
Etc., et al.,

Appellants,

v8.

WM. DUBY, H. B. VAN DUZER, and W. H.
MALONE, Etc.,

Appellees.

*Appeal from the District Court of the United States
for the District of Oregon*

Brief of Appellees

Statement

In our opinion the statement made by the plaintiffs does not fully reveal all the facts necessary to a complete understanding of the issues, and, therefore, we take the liberty to make our own statement.

The plaintiffs in this law suit have challenged the right of the State of Oregon to regulate, by legislative act, the use of the state's public highways. In order that the court may fully understand the issues we deem it necessary to relate the history or story of events and circumstances attending the controversy.

The sixty-fourth congress of the United States of America passed a statute which was approved June 11, A. D. 1916, which act was entitled "An act to provide that the United States shall aid the state in the construction of rural post roads, and for other purposes." Subsequently the sixty-fifth congress of the United States of America, by an act approved February 28, A. D. 1919, made further and additional provision for carrying out the requirements and purposes of the original and former act.

Both of the above acts appropriated and made available said funds for use in the construction of highways under a plan of cooperation between the several states. The original act contained a provision to the effect "that the secretary of agriculture is authorized to cooperate with the states, through their respective state highway departments, in the construction of rural post roads; but no money apportioned under this act to any state shall be expended therein until its legislature shall have assented to the provisions of this act, except that, until the final adjournment of the first regular session of the legislature held after the passage of this act, the assent of the governor of the state shall be sufficient. The secretary of agriculture and the state highway department of each state shall agree upon the roads to be constructed therein and the character and method of construction; provided, that all roads constructed under the provisions of this act shall be free from all tolls of all kinds."

The State of Oregon complied with the requirements of the federal act and qualified for the aid offered by the federal government. The acceptance of and qualification by the State of Oregon is found in the enactment by the Oregon state legislature of chapter 175, General Laws of Oregon, 1917, in which act the legislature, after setting out in full the federal act, said: "The State of Oregon

hereby accepts the provisions of said act and agrees to cooperate with the federal government in carrying out the provisions thereof."

Thereafter the State of Oregon further qualified and disclosed its intention to cooperate with the federal government by the enactment of subsequent acts relating to highway construction. In said act by the Oregon legislature, and in subsequent acts, the State of Oregon made provision for the necessary funds with which to meet the aid offered by the United States and the State of Oregon provided for a highway commission and gave to that commission the following instructions and authority:

The state highway department is hereby authorized to enter into all contracts and agreements with the United States government relating to the survey, construction or improvement and maintenance of roads under the provisions of said act of congress, to submit such scheme or program of construction or improvement and maintenance as may be required by the secretary of agriculture, and do all other things necessary fully to carry out the cooperation contemplated and provided for by the said act. For the construction or improvement and maintenance of rural post roads the good faith of the state is hereby pledged to make available funds sufficient to equal the funds apportioned to the state by or under the United States government during each of the five years for which federal funds are appropriated * * *.

The state then exercised the right to regulate the use of its public highways, and in the exercise of that right provided for the licensing of motor vehicles and their use of the highway. As a part of the legislation covering the subject of highway regulation the legislature provided that no vehicle, motor vehicle, motor truck, device or thing, having a combined weight in excess of 22,000 pounds at the point of contact of the four wheels of any such vehicle

with the surface of the highway, or a combined weight of more than 17,600 pounds at the point of contact of the two wheels of any one axle of any such vehicle, shall be moved over or upon any highway of the state without the written permission of the State Highway Commission, or of the county court of the county in which the particular road is located, in the event the road be a county road.

For the purpose of further safeguarding and preserving the highways the legislature provided with respect to state highways, that whenever the highway commission shall find that any state highway, or section thereof, is being damaged by reason of being subjected to any particular kind or character of traffic, or whenever in the judgment of the highway commission it would be for the best interests of the state highway and would result in protecting said highway from undue damage, said commission may reduce the maximum weight and speed below that fixed in the statute.

Pursuant to said legislative authority the highway commission on August 28, 1925, after a careful examination and as a result of an extensive study, reached the conclusion and judgment that a section of one of the state highways was being seriously damaged by reason of the heavy traffic which was moving thereover, and, having reached such conclusion and judgment, the highway commission, under authority of said legislative act, made its order reducing the maximum weight of load permitted upon said section of said highway to 16,500 pounds.

The plaintiffs challenged the validity of the legislative act, and likewise challenged the validity of the order of the commission, and they sought a temporary restraining order and a permanent injunction against the enforcement of the order of the commission.

The plaintiffs attempted to support their challenge of the state law upon three grounds:

- (1) The alleged unconstitutionality of the Oregon law.
- (2) The alleged violence done by the Oregon law and by the order of the commission, to the act of congress, known as the "Federal Road Act."
- (3) Repudiation of alleged contractual obligations.

The matter was presented to Honorable Wm. Gilbert, judge of the United States circuit court of appeals, for the ninth district; and the Honorable Chas. E. Wolverton and Honorable Robert S. Bean, judges of the district court of the United States for the district of Oregon, under the issues made by the plaintiffs in their original bill of complaint. An order was made by the court denying plaintiffs' application for a temporary restraining order, and the court thereafter granted defendant's motion to dismiss the bill of complaint.

The plaintiffs applied for, and were granted, the right to file an amended bill of complaint. There appears very little, if anything, in the amended complaint which materially changed the situation or made the principles of law and their application any different than prevailed under the original bill. In the amended complaint the plaintiffs sought to procure some benefit from the law applicable to interstate commerce, and for that purpose alleged that the freight which was carried by the plaintiffs in intrastate traffic ultimately acquired the characteristics and status of interstate traffic by reason of the fact that a portion of such freight, after being delivered by plaintiffs at their terminal in Portland, was picked up by carriers operating in interstate commerce.

Plaintiffs then took, and still take, the position that the State of Oregon is under contract with the federal government to maintain the public highways, regardless of the

cost, and that such highways must be maintained in such state of repair and condition as to meet the needs and requirements of the plaintiffs and others similarly engaged.

The plaintiffs contend further that the alleged contractual obligations existing between the federal government and the State of Oregon exist for the benefit of the plaintiffs, and that the State of Oregon is without right or authority to modify that contract even with the approval of the federal government.

All the issues involved were decided by the court adversely to plaintiffs, and the Oregon law and the position of the highway commission were sustained in every particular; and the plaintiffs now come to this court asking for the relief they were denied in the court below.

Argument

THE PLAINTIFFS ARE NOT ENTITLED TO INJUNCTIVE OR OTHER RELIEF AGAINST THE OREGON STATE HIGHWAY COMMISSION ON THE GROUND STATED IN THEIR COMPLAINT AND CAN NOT BE RELIEVED OF THE EFFECT AND SCOPE OF THE COMMISSION'S ORDER, for:

I

THE PARAMOUNT CONTROL OF THE PUBLIC HIGHWAYS OF THE STATE IS VESTED IN THE STATE LEGISLATURE. CONTROL IS SOMETIMES DELEGATED, BUT IS NEVER SURRENDERED.

This principle of law has been well and fully established, and is a principle recognized, we believe, in practically all of the sovereign states, and one long recognized and followed in this state. The following authorities are cited in support of this principle, subject to constitutional limitation:

The state has absolute control over its public streets and highways, including those of its municipal and quasi-municipal corporations.

13 R. C. L., § 143.

The improvement of the boulevard in question was a question over which the state, if it had deemed it proper to do so, could have taken immediate charge by its own agent, for it is one of the functions of government to provide public highways for the convenience and comfort of the people.

Atkin v. Kan., 191 U. S. 207 at 221-22.

The legislature of the state represents the public at large, and has, in the absence of special constitutional restraint and subject to the property rights and easements of the abutting owners, full and paramount authority over all public ways and public places. 2 Dillon Mun. Corp. 4 Ed., Sec. 656.

Cicero Lbr. Co. v. Cicero, 176 Ill. 9 at 21-22.

Paramount authority over streets and highways is vested in the legislature as a representative of the entire people.

Salem v. Anson, 40 Or. 339 at 343.

All roads established by legislative authority are public roads in so far as the right of the citizens to travel on them is concerned, but they do not all belong to the state. It must, however, be true that over all ways in which there is a public right there must be some legislative authority. Presumptively all roads laid out under legislative enactments are public ways belonging to the state and under full control of the legislature.

Elliott's Roads and Streets, 2 Ed., p. 8, § 9.

So it is (the legislature) has power to give jurisdiction over city streets to the municipality or to the park commission or police board, or subject to the authorities, as it deems fit. It (the legislature) also has power to divest municipalities of all control over their streets, and to change such control at its pleasure.

13 R. C. L., § 143, p. 164.

Primarily the state has paramount control over all the highways within its borders, including public streets and highways in the confines of the municipalities. Whatever authority a municipality may enjoy or possess pertaining to its streets and highways must be derived from the legis-

lative assembly through its franchise or charter. 2 Dillon Mun. Corp., 4 Ed. 680, 683; *Winter v. George*, 21 Or. 251 at 259; (27 Pac. 1041); *Simons v. Northrup*, 27 Or. 487, 501 (40 Pac. 560; 30 L. R. A. 171). Nor does the mere fact that the state has delegated certain power to the municipality inhibit it from again resuming or exercising such power; hence it is said the legislature of the state represents the public at large, and has in the absence of a special constitutional restraint and subject (according to the weight of more recent judicial opinion) to the property rights and easements of the abutting owner, full and paramount authority over all public ways and public places. 2 Dillon Mun. Corp., 4 Ed. 656. The logical cogent result of these principles is that the state, as well as the city and township to which it has previously delegated the requisite authority, may fix and establish the grades of the streets and public highways within the corporate limits of such municipalities.

Brand v. Multnomah County, 38 Or. 79, 91.

The streets of a city are not its private property, but they are for the use of the public, whose general agent is the legislative assembly, which, in the absence of any constitutional restriction, has paramount authority over such highways, including bridges thereon, and may grant the supervision and control thereof to some other governmental agency, so long as the way is not diverted to a use inconsistent with or substantially different from that which was originally designed, provided, however, that the change is not intended to impose upon one municipality a debt incurred by another.

Yocum v. City of Sheridan, 68 Or. 237.

But, if it were otherwise, the law is now too well settled to be questioned that the public highways of a city are not the private property of the municipality, but are for the use of the general public, and that, as the legislature is the representative of the public at large, it has, in the

absence of any constitutional restrictions, paramount authority over such ways, and may grant the use or supervision and control thereof to some other governmental agency so long as they are not diverted to some use substantially different from that for which they were originally intended.

Simon v. Northrup et al., 27 Or. 237.

Berry, Automobiles, 4 Ed., p. 33, § 34.

Huddy on Automibiles, p. 62, § 38.

Jas. Stephens and Wm. H. Frush v. David Powell, 1 Or. 283 at 284.

Reed v. Dunbar, 41 Or. 509, 514.

Straw v. Harris, 54 Or. 424, 432.

II

IT IS A RULE OF LAW THAT THE COURT WILL FOLLOW THE INTERPRETATION GIVEN A STATUTE BY THE STATE COURT IF IT IS NOT REPUGNANT TO THE LAWS OF THE GENERAL GOVERNMENT.

While the mere rejection of defendant's offer of proof does not strictly present a federal question, we may properly regard the exclusion of the evidence upon the ground of its incompetency or immateriality under the statute, showing what in the opinion of the state court is the scope and the meaning of the statute, taking the above observations of the state court as indicating the scope of the statute, and such is our duty. (*Leffingwell v. Warren*, 2 Black. 599, 603; *Morley v. Lakeshore R. R. Co.*, 146 U. S. 162, 167; *Tullis v. L. E. & W. R. R. Co.*, 175 U. S. 348.)

Jacobson v. Mass., 197 U. S. 11, 24.

We come then to inquire whether any right given or secured by the constitution is invaded by the statute if interpreted by the state court.

Jacobson v. Mass., 197 U. S. 11, 25.

The questions just stated are questions of local law, and in determining whether the statute violates any right secured by the federal constitution we must in the particulars named accept the interpretation put upon it by the state court. In *Tullis v. Lake Erie & Western R. R.*, 175 U. S. 348, 353, the question as to the constitutionality of the City of Indiana relating to railroads and other corporations, except municipal corporations. The supreme court of that state held that the statute was capable of severance, and that its provisions as to railroads were not so connected in substance with the provisions relating to other corporations that their validity could not be separately determined. This court, following that view, declared it to be an elementary rule that it should adopt the interpretation of the statute of a state affixed to it by a court of last resort thereof. (*Mo. Pacific Railroad Co. v. Neb.*, 164 U. S. 403, 414; *Chicago & Milwaukee R. R. Co. v. Minn.*, 134 U. S. 418, 456; *St Louis Iron Mt. & R. R. Co. v. Paul*, 173 U. S. 404, 408.)

W. W. Cargill Co. v. Minn., 180 U. S. 452, 466.

The highest court of the state has construed the section as applying to common carriers engaged exclusively in interstate commerce. (*Northern P. R. Co. v. Schoenfeldt*, 123 Wash. 579, 213 Pac. 26; *State ex rel. Schmidt v. Department of Public Works*, 123 Wash. 705, 213 Pac. 31.) The main question for decision is whether the statute, so construed and applied, is consistent with the federal constitution and the legislation of congress.

U. S. Sup. Ct. Adv. Opinions, Mch. 16, 1925, p. 301; 267 U. S. 307, 45 Sup. Ct. Rep. 324.

Buck v. Kuykendall, 69 L. Ed. 623, 625.

This court has uniformly professed its disposition, in cases depending on the laws of a particular state, to adopt the construction which the courts of the state have given to those laws. This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing legislative acts of that government. Thus, no court in the universe which professed to be governed by principle would, we presume, undertake to say that the courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute. On this principle, the construction given by this court to the constitution and laws of the United States is received by all as the true construction; and, on the same principle, the construction given by the courts of the several states to the legislative acts of those states, is received as true, unless they come in conflict with the constitution, laws, or treaties of the United States. If, then, this question has been settled in Kentucky, we must suppose it to be rightly settled.

Elemendorf v. Taylor, et al., 10 Wheat. 153, 6 L. Ed. 289, 292.

For the purposes of this case, we must treat the statute, as requiring those engaged in interstate commerce to give all persons traveling in Louisiana, upon the public conveyances employed in such business, equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color. Such was the construction given to that act in the courts below, and it is conclusive upon us as the construction of a state law by the state courts.

Hall v. DeCuir, 95 U. S. 485, 24 L. Ed. 547.

As remarked in *Missouri, K. & T. R. Co. v. McCann*, 174 U. S. 580, 586, 43 L. Ed. 1093, 1096, 19 Sup. Ct. Rep. 755, the contention calls on this court to disregard the interpretation given to a state statute by the court of last resort of the state, and, by an adverse construction, to decide that the state law is repugnant to the Constitution of the United States. "But the elementary rule is that this court accepts the interpretation of a statute of a state affixed to it by the court of last resort thereof."

Tullis v. Lake Erie & W. R. Co., 44 L. Ed. 192, 195; 175 U. S. 348, 20 Sup. Ct. Rep. 136.

It is well settled that in cases of this kind the interpretation placed by the highest courts of the state upon its statutes is conclusive here. We accept the construction given to a state statute by that court. (*St. Louis I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 408, 43 L. Ed. 746, 19 Sup. Ct. Rep. 419; *Missouri, K. T. R. Co. v. McCann*, 174 U. S. 480, 586, 43 L. Ed. 1093, 1096, 19 Sup. Ct. Rep. 755; *Tullis v. Lake Erie & W. R. Co.*, 175 U. S. 348, 44 L. Ed. 192, 20 Sup. Ct. Rep. 136.) Nor is it material that the state court ascertains the meaning and scope of the statute, as well as its validity, by pursuing a different rule of construction from that we recognize. It may be that the views of the Kansas court in respect to this matter are not in harmony with those expressed by us in *U. S. v. Reese*, 92 U. S. 214, 23 L. Ed. 563; *Trade Mark Cases (U. S. v. Steffens)*, 100 U. S. 82, 25 L. Ed. 550; *U. S. v. Harris*, 106 U. S. 629, 27 L. Ed. 219, 1 Sup. Ct. Rep. 601 and *Baldwin v. Franks*, 120 U. S. 678, 30 L. Ed. 766, 7 Sup. Ct. Rep. 656, 763. We shall not stop to consider that question nor the reconciliation of the supposed conflicting views suggested by the chief justice of the state. The power to determine the meaning of a statute carries with it the power to prescribe its extent and limitations, as well as the method by which they shall be determined.

Smiley v. Kan., 49 L. Ed. 546, 550; 196 U. S. 447, 25 Sup. Ct. Rep. 289.

The construction given to a statute of a state by the highest judicial tribune of such state is regarded as a part of the statute, and is as binding upon the court of the United States as the test. (*Leffingwell v. Warren*, 2 Black. 599, 603.) The meaning of the state statute declared by the highest court of a state is conclusive upon this court. (*Randall v. Brigham*, 7 Wall. 523, 541.)

Morley v. Lakeshore R. R. Co., 146 U. S. 162, 167.

Thus it will be seen that under the act as construed by the state court, whose construction is binding upon us * * *.

Frost v. R. R. Commission, P. 682, 684; 46 Sup. Ct. 605; Adv. Opinions, Sup. Ct. U. S., Jul. 1, 1926.

Cooley, Taxation, vol. 2, 4th Ed., p. 1094.

Adams Express Co. v. Ohio St. Auditor, 165 U. S. 194, 219.

Lamburn v. County Commissioner, 97 U. S. 181, 186.

Osborne v. Fla., 164 U. S. 650, 654.

Mich. Central R. R. Co. v. Powers, 201 U. S. 245, 291.

III

THE OREGON LEGISLATURE HAS ELECTED TO DELEGATE ITS CONTROL OVER THE PUBLIC HIGHWAYS OF THE STATE TO CERTAIN MUNICIPALITIES AND COMMISSIONS.

Provisions of chapter 295, General Laws of Oregon, 1917: Control of county highways and the streets of an incorporated town has been vested in the several county courts. Section 2: Authority of the county court over roads.

All roads shall be under the supervision of the county court wherein said road is located. Every county court within this state shall have the authority, and it shall be its duty to supervise, control and direct the laying out, opening, establishing, locating, relocating, changing, altering, straightening, working, grading, maintaining and keeping in repair, improvement and vacation of all county roads within its county, and shall prescribe the methods and manner of working, improving and repairing the same, and to legalize old roads and to restore monuments thereon; and

except as shall be expressly provided, no county roads shall be hereafter established, nor shall any such road be altered or vacated in any county in the state except by authority of the county court of the proper county. The county court shall also supervise the construction and repair of all bridges on the county roads. The power therein given may be exercised directly by the court or through some one of its members designated for that purpose, with the aid of necessary assistance. The foregoing enumeration of powers of the county court shall not be construed as a denial of power necessarily incident thereto.

Chapter 295, General Laws of Oregon, 1917.

By charter provision by general law control of city streets has been delegated to the city authorities.

By provision of 237, chapter 423, General Laws of Oregon, 1917, and by subsequent and supplementary acts, legislature has delegated control over state highways to the State Highway Commission.

Sec. 5. Said commission shall have the power to carry out the provisions of this act and its duties shall be such as are provided herein. The commission is hereby authorized to make such rules and regulations as it may deem necessary. Said commission shall have general supervision over all matters pertaining to construction of state

highways, letting of contracts therefor, and the selection of materials to be used in the construction of state highways under the authorities of this act. The commission shall also determine and adopt the general policy of the highway department in deciding questions relating to the administration of the department. Said commission shall designate, construct or cause to be constructed a system of state highways within the state of Oregon, which highways shall be designated by law and by the point of beginning and terminus thereof.

Chapter 237, General Laws of Oregon, 1917.

IV

COUPLED WITH THE DELEGATION TO THE STATE HIGHWAY COMMISSION OF CONTROL OVER STATE HIGHWAYS IS THE LEGISLATIVE DELEGATION OF THE STATE HIGHWAY SYSTEM.

The same legislative session which created our present highway commission selected and designated a system of state highways comprising approximately 4,500 miles, and charged the State Highway Commission with the improvement and maintenance of the same. This selection and designation of state highways is found in chapter 423, General Laws of Oregon, 1917.

V

THE POLICE POWER IS INHERENT IN THE SEVERAL STATES, AND THE RIGHT TO REGULATE THE PUBLIC HIGHWAYS OF A STATE IS A RIGHT THAT EXISTS UNDER THE POLICE POWER, AND, THERE-

FORE, CAN NOT BE ABRIDGED, ALIENATED OR CONTRACTED AWAY BY THE LEGIS- LATURE.

The police power is inherent in the several states and is left with them under the federal system of government, and may always be exercised by the state legislature. It follows that the federal government can not exercise any police powers within the several states, but can exercise such power only where the authority of congress excludes territorially all the state legislation, as, for instance, in the District of Columbia, where police power of congress is the same as that of the state legislatures within their several jurisdictions.

22 Am. & Eng. Encyclopedia of Law, p. 919, § 4.

Sec. 4. The principle that no person shall be deprived of life, liberty or property without due process of law was embodied in substance in the constitution by nearly all, if not all, of the states at the time of the adoption of the fourteenth amendment, and it has never been regarded as incompatible with the principle equally vital because essential to persons, safety and society that all property in this country is held under the implied obligation that the owners' use of it shall not be injurious to the community. *Beer & Co. v. Mass.*, 97 U. S. 25 at 32; *Commonwealth v. Alger*, 7 Cush. 53, 89; *Patterson v. Ky.*, 97 U. S. 501, 505. It has, nevertheless, with marked distinctness and uniformity recognized the necessity growing out of the fundamental condition of civil society to uphold state police regulations which were enacted in good faith and had appropriate and direct connection with that protection to life, health and property which each state owes to her citizens. (The above is a quotation from *Fertilizing Co. v. Hyde Park*, 97 U. S. 659 at 667.)

Mugler v. Kan., 123 U. S. 623 at 665.

We can not doubt that the police power of the state was applicable and adequate to give an effectual remedy. That power belonged to the state when the federal constitution was adopted. They did not surrender it, and they all have it now. It extends to the entire property and business within their local jurisdiction, and both are subject to it. In all proper cases it rests on the fundamental principle that every one shall so use his own property as not to wrong or injure others. To regulate and abate nuisances is one of its ordinary functions.

Mugler v. Kan., 123 U. S. 623 at 667.

By the tenth amendment powers not delegated to the United States by the constitution, nor prohibited to the states, are reserved to the states respectively or to the people.

Among the powers thus reserved to the several states is what is commonly called "police power"—that inherent and necessary power essential to the general existence of civil society and the safeguard of the inhabitants of the state against death, disease, poverty and crime.

"The police power belongs to the states by virtue of their general sovereignty," said Mr. Justice Story during the judgment of his court. "It extends over all subjects within the territorial limits of the state, and has never been conceded to the United States." *Prigg v. Pa.*, 16 Pet. 539, 645.

Leisy v. Hardin, 135 U. S. 100 at 127.

Special licenses and permits to occupy highways for uses other than those strictly pertaining to the primary object of their establishment are always subject to the police power, and this rule holds as to the subsurface as well as the surface. Hence, a vault constructed under a street by an abutting owner may be appropriated by a municipality at any time public necessities require, although the vault was constructed with its consent. And a town or city can not give a vested right to maintain a private drain

in a highway, so that a subsequent cutting off of the drain by an extension of a system of sewers will create any liability against the municipality. Rights in streets or highways granted to public service corporations are at all times held in subordination to the superior rights of the public and all necessary and reasonable police ordinances, notwithstanding they may interfere with legal franchise rights. The grantee takes them subject to the paramount right of the municipality to grade and improve its streets, and to make such requirements and regulations as are necessary and reasonable in order to make the streets suitable and convenient for the use of the traveling public, and will be required to make such changes in its appliances as are rendered necessary thereby at its own expense. The police power can not be surrendered, so that the franchises of private corporations must be conclusively presumed to be acquired with reference to its existence, and contract rights must yield to the proper burdens imposed by growth and development. This extensive power, however, or regulation is not to be exercised at mere whim or caprice, but should be appropriate to and commensurate with the public necessity for the protection and promotion of public morals, health, safety, necessity, or convenience. Nor can its application be extended by the authority which is intrusted with such application to an arbitrary misuse of private rights, and any such unwarranted exercise of authority is unconstitutional and void.

13 R. C. L., pp. 177, 178, 179.

All agree that the legislature can not bargain away the police powers of the state; irrevocable grants or property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the state, but no legislature can curtail the power of its successors to make such laws as they may deem proper in the matter of police. *Boyd v. Allen*, 94 U. S. 645.

Stone v. State of Mississippi, 101 U. S. 814,
25 U. S. Sup. Ct. Rep. 1079.

It is established by repeated decisions of this court that neither of these provisions of the federal constitution has the effect of over-riding the power of the state to establish all regulation reasonably necessary to secure good health, safety or general welfare of a community; that this power can neither be abdicated nor bargained away, and is inalienable even by explicit grant, and that all contracts and property rights are held subject to its fair exercise. *Atlantic Coast Land Co. v. Goldsboro*, 232 U. S. 548 at 558; 34 Sup. Ct. Rep. 364.

Chicago & Alton R. R. Co. v. Henry A. Tranbarger; 35 Sup. Ct. Rep. 678, 682; 238 U. S. 667.

Upon reason and authority the matter of regulating the amount of loads to be hauled over the public highways is generally recognized as properly within the discretion of the authorities charged by the law with the care and maintenance of the highway, and it is likewise settled that when any such regulation within the scope of the authority of the law-making power has been passed, the prima facie presumption is that the regulation is reasonable and proper, and in order to warrant the court in coming to a definite conclusion there must be evidence introduced showing that in the particular case the discretion granted to the legislative body has been abused and the rights of the individuals taken from them.

Standard Oil Co. v. Commonwealth, 109 S. E. 316 at 320.

Cooley on Constitutional Law, p. 542 (in notes).
Transportation Co. v. Chicago, 99 U. S. 635, 642.
Slaughter House Case, 16 Wall, 36 at 62.
Fertilizing Co. v. Hyde Park, 97 U. S. 659, 669.
Phelan v. Va., 8 How. 163 at 168.
Stone v. Miss., 101 U. S. 814.
Patterson v. Kentucky, 97 U. S. 501 at 503.
Gibbons v. Ogden, 9 Wheat. 31.
 Police Power, *Supra* Brief, p. 7.

VI

THE AUTHORITY AND JURISDICTION
WHICH A LEGISLATURE MAY EXERCISE
UNDER ITS POLICE POWER IT MAY ALSO
DELEGATE, WHICH IT HAS ELECTED TO
DO IN THIS INSTANCE.

Section 36, General Laws of Oregon, 1921, p. 733. The streets of a municipality, or public highways of the state, and the power of the legislature to supervise, regulate, and control the use thereof is paramount, but the legislature may delegate that supervision, control and regulation to a municipality in respect to the public streets within its limits, or it may clothe some other governmental agency with that authority so long as its streets are not diverted to something substantially different from that for which they were originally intended.

Dent v. Oregon City, 106, Or. 126.

The police power of the state may be in the absence of any constitutional restriction upon the subject, delegated to the various municipalities throughout the state to be exercised by them within their corporate limits.

22 Am. & Eng. Encyclopedia of Law, 1919, § 4, subsec. 2.

In the present case, as has already been seen, the legislature authorized the city council to empower the board of police to make rules and regulations, and a majority of the court is of the opinion that there are no constitutional objections to this delegation of authority.

Commonwealth v. Plasted, 148 Mass. 375 at 383.

Such a statute is clearly within the legislative province to enact, for it is with reference to such matters as the public highways of the state over which the legislature

has a primary power as to the laying and vacating thereof. *Chicago & N. W. R. Co. v. R. R. Commissioner*, 168 Wis. 185, 191; *Krueger v. Wis. Telephone Co.*, 16 Wis. 96, 104; 37 Cyc. 45; 13 R. C. L. 163. It is a power which it may delegate to some appropriate administrative body. Nevertheless it is still an exercise of such power by the state itself.

Madison v. Fuller & Johnson Mfg. Co., 176 Wis. 462, 469.

Under the provisions of chapter 10, municipalities are given the power to regulate and control traffic upon their streets which begins, ends and is completed within their corporate limits, but as to the transportation for hire of passengers or property by motor vehicles not exclusively and wholly conducted within the corporate limits of a city or town the power to regulate it is conferred exclusively upon the public service commission of the state, and no power, whether previously conferred by charter or legislative enactment, remains in the cities or towns except the mere power to pass or enforce some purely regulatory ordinance which in no wise conflicts or interferes with the regulation of the traffic, by the public service commission.

Parker v. City of Silverton, et al., 109 Or. 303.

Jacobsen v. Mass., 197 U. S. 11, 25.

VII

THE ORDER MADE BY THE HIGHWAY COMMISSION REDUCING THE LOAD LIMIT IS A REASONABLE EXERCISE OF THE POLICE POWER.

In determining what is a reasonable exercise of the police power the court, we believe, will be guided in a large measure by the purpose of the law and the object of the

order. Courts are slow to overthrow those measures which have for their end the promotion of the general good and the convenience of the general welfare and prosperity.

In answer to that question we must be cautious about pressing the broad words of the fourteenth amendment to a direly logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown easily enough to transgress the scholastic interpretation of one or the other of the great guarantees in the bill of rights. They more or less limit the liberty of the individual or diminish property to a certain extent. We have few uniformly certain criteria of legislation, and as it often is difficult to draw the line where what is called the police power of the state is limited by the constitution of the United States judges should be slow to read into the latter (*nolamus mutare*) as against the law-making power. In the first place it is established by a series of cases as an ulterior public advantage may justify a comparatively insignificant taking of private property for what in its immediate purpose is of private use. *Clark v. Nash*, 198 U. S. 361; 49 L. Ed. 1085; *Strickley v. Hyland Bay Gold Mine III Co.*, 200 U. S. 527, 531. And in the next it would seem that there may be other cases besides the everyday one of decisions in which the share of each party in the benefit of the scheme of mutual protection is sufficient compensation for the correlative burden it is compelled to assume. *Ohio Oil Co. v. Ind.*, 177 U. S. 190.

It may be said in a general way that the police powers extend to all great public needs. *Clanfield v. U. S.*, 167 U. S. 518.

Noble State Bank v. Haskell, 219 U. S. 104, 31 Sup. Ct. Rep. 186, 187, 188.

The right to exercise the police power is a continuing one, and may be exercised so as to meet the ever changing conditions and necessities of the public. Those who make investments for this purpose, as the plaintiff, do so and hold their property and their rights to use it subject to

such other and different burdens as the legislature may reasonably enforce for the safety, welfare and convenience of the public. The state legislature may regulate the use by automobiles and motor cars of the highways of the state. *Hendrick v. Maryland*, 235 U. S. 610 at 635. It may also authorize municipalities to regulate the use of the streets by vehicles, and may exclude vehicular traffic. *Barnes v. Essex Co. Park Com.*, 86 N. J. Law 141; 91 Atl. 1019.

Lane v. Whitaker, 275 Fed. 476, 479.

And it is also settled that the police power implies regulation designed to promote the public convenience or the general welfare and prosperity, as well as those in the interest of the public health, morals and safety. *Lakeshore, Mich. Southern M. S. R. Co. v. Ohio*, 173 U. S. 285, 292; Sup. Ct. Rep. 465; *Chicago B. & Q. R. Co. v. Ill.*, 200 U. S. 561, 592; *Bacon v. Walker*, 204 U. S. 311, 317; 27 Sup. Ct. Rep. 287.

Chicago & Alton R. R. Co. v. Henry A. Transbarger, 238 U. S. 67; 35 Sup. Ct. Rep. 678, 682.

The power and authority of the highway commission to superintend, construct, and maintain state highways includes the authority to preserve from destruction or deterioration, and, if this be so, the authority also to forestall and prevent encroachment thereon by any person or corporation that would prove deleterious to such highways or detrimental to the use thereof by the general public. I think this follows from the general power and authority accorded the highway commission. However, as the right and privileges are granted to public service corporations to construct, maintain, and operate telegraph and telephone lines along the public roads of the state, the highway commission can not so exercise its authority as to deny arbitrarily such corporations that right or privilege; but it does possess the power and authority of

reasonable regulation as to these lines—that is, as to the manner of their construction and the place of location as they may affect the highways and their use by the public

* * *

So it is that the highway commission may exercise this power of regulation, within reasonable bounds, to conserve both the service utilities and the public welfare, and such utilities must submit to its designation of the place of locating their lines and the manner of their construction, so long as the acts of the commission in this respect are not a denial of their right to construct and maintain along the highway, and are not tantamount to an arbitrary exercise of its power and authority in the premises.

Postal Telegraph Co. v. State Highway Commission, 276 Federal Reporter 962.

Noble State Bank v. Haskell, 219 U. S. 104.

C. B. & Q. v. McGuire, 219 U. S. 549; 31 Sup. Ct. Rep. 259, 263.

Crowley v. Christensen, 137 U. S. 86.

Jacobsen v. Mass., 197 U. S. 11, 24, 25, 26, 27, 35.

McClellan v. Ark., 167 U. S. 547, 548.

State ex rel. Bonsteel v. Allen, 83 Fla. 214, 217, 218, 228.

State v. Mays, 26 L. R. A. N. S. 506.

13 R. C. L., § 212, p. 256, 257.

The foregoing principles of law show that the power delegated to the State Highway Commission was a power that rested with state legislature, and that it might delegate and the commission exercise. Therefore, since there are no facts diverting these principles the injunction was well refused.

VIII

IT WAS NOT NECESSARY AND THE PLAINTIFFS CAN NOT ASSERT OR SHOW ANY RIGHT TO BE HEARD AS A CONDITION PRECEDENT TO THE MAKING OF THE ORDER NOW CHALLENGED:

The statute which authorizes the highway commission to limit the weight of loads upon state highways provides that whenever the commission shall find that it will be for the best interests of the state, and will protect from undue damage any highway or section of any highway, it may make an order reducing the weight of loads allowed upon such highway or section thereof. There is no provision in the statute requiring a hearing or requiring that notice be given to any member of the public using the highway. The statute simply provides that when the commission shall find certain conditions it may make the order. Plaintiffs have attached to their complaint a copy of the order from which it can be ascertained that the conditions set out in the statute were complied with by the commission. Plaintiffs can not be heard to read into the statute conditions not placed there by the legislature.

The only requisite is that the order be authorized by law and that it be reasonable:

Municipal regulation against carrying on any vehicle in any street a load of more than three tons was held a reasonable exercise of power in *Com. v. Mulhall*, 162 Mass. 496, 44 Am. St. Rep. 387, 39 N. E. 183, under legislative authority to make such rules and regulations for the passage of vehicles as were necessary for public safety or convenience.

A city charter granting full power to make rules and ordinances respecting streets, carriages, wagons, etc., and in general every other regulation appearing requisite and

necessary, authorizes an ordinance limiting the weight which vehicles shall carry through the streets. *Nagle v. Augusta*, 5 Ga. 546.

The authority of a municipality to adopt an ordinance limiting heavy vehicles to one side of a street is conferred by a statute authorizing ordinances for the regulation of all vehicles used therein, by establishing the rates of fare, routes, and places of standing, and in any other respect. *State v. Boardman*, 93 Me. 73, 46 L. R. A. 750, 44 Atl. 118.

The enactment of a city ordinance prohibiting the drawing of loads in excess of a certain weight over paved streets, except in wagons having tires of a certain width, is a reasonable exercise of a charter power granting the right to lay out streets, pave and repair them, and exercise general supervision over them, and to enact ordinances to carry out those objects. *People v. Wilson*, 41 N. Y. S. R. 765, 16 N. Y. Supp. 583.

State v. Bussian, 31 L. R. A. (N. S.) 685, and notes.

In *People, Branson v. Walsh*, 96 Ill. 232, 36 Am. Rep. 135, the case of *People v. Kerr*, 27 N. Y. 188, was referred to with approval, and the following quotation was made therefrom: "So far as the existing public rights in these streets are concerned, such as the right of passage and travel over them as common highways a little reflection will show that the legislature has supreme control over them. When no private interests are involved or invaded, the legislature may close a highway, and relinquish altogether its use by the public, or it may regulate such use, or restrict it to peculiar vehicles, or to the use of particular motive power. It may change one kind of use into another, so long as the property continues devoted to public use. What belongs to the public may be controlled and disposed of in any way which the public agent sees fit." *Cicero Lumber Co. v. Cicero*. 42 L. R. A. 703.

It is an equal right of all to use the public streets for purposes of travel by proper means, and with due regard for the corresponding rights of others; and it is also too

well recognized in judicial decisions to be questioned that an automobile is a legitimate means of conveyance on the public highways. But the right to so use the public streets, as well as all personal and property rights, is not an absolute and unqualified right. It is subject to be limited and controlled by the sovereign authority—the state—whenever necessary to provide for and promote the safety, peace, health, morals, and general welfare of the people. To secure these and kindred benefits is the purpose of organized government, and to that end may the power of the state, called its police power, be used. By the exercise of that power through legislative enactments, individuals may be subjected to restraints, and the enjoyment of personal and property rights may be limited, or even prevented, if manifestly necessary to develop the resources of the state, improve its industrial conditions and secure and advance the safety, comfort, and prosperity of its people.

And it is fundamental law that no constitutional guaranty is violated by such an exercise of the police power of the state, when manifestly necessary, and tending to secure such general and public benefits. Citing many cases.

That reasonable regulations for the safety of the people while using the public streets are clearly within this police power of the state is too plain to admit of discussion. Such is and has been the law everywhere.

Since the introduction of automobiles as vehicles of conveyance, many cases have arisen, and been decided by the courts of last resort, in different states, respecting the validity and construction of statutes and ordinances regulating their use upon the public highways, and it has been uniformly held that the state, in the exercise of its police power, may regulate their speed, and provide other reasonable rules and restrictions as to their use.

State v. Mayo, 26 L. R. S. (N. S.) 506.

A statute may require slow-moving vehicles to keep to the right side of the streets at points where traffic is large or the streets are usually congested, and it is no defense that at the time of its violation the defendant was

not in fact blocking the traffic. So ordinances requiring heavy vehicles to use one side of a street only are generally upheld if reasonable. Such an ordinance does not deprive a person of any right but simply regulates the exercise of it, and its effect may be to afford to all travelers much better opportunities for travel than they could otherwise enjoy. That portion of the street so designated must be reasonably suited, for the purpose, however, and if it is not so suited, or is absolutely impassable, then the ordinance is unreasonable and can not be enforced. Statutes, requiring vehicles carrying loads of a certain weight to be furnished with tires of a certain width are generally held to be valid, and municipal ordinances to the same effect are also generally upheld if reasonable and within the charter powers of the municipality, as are ordinances limiting the weight which vehicles may carry through the streets. It has been held, however, that an express grant of power to regulate by ordinance the width of the tires of all vehicles for "heavy transportation," impliedly excludes the power to regulate the width of tires on all vehicles for transportation irrespective of the character of the transportation, although such power might otherwise have been implied from the general power to improve and regulate the use of streets. A statutory provision conferring upon a municipal corporation authority to care for, supervise, and control all public highways, streets, bridges, etc., empowers a city to enact an ordinance requiring vehicles passing over bridges to keep on the right-hand side, and forbidding one vehicle to pass another on any bridge. And an ordinance requiring drivers of vehicles to keep to the right of the center of the street, and, when turning to the left to enter an intersecting street, to turn only after passing the center of such intersecting streets, has been held to be a proper exercise of the police power. So ordinances requiring vehicles to carry lights at night are generally held to be valid. But the power conferred on municipal corporations to regulate the movement of teams and vehicles does not warrant the total prohibition of such traffic generally in certain parts of a city street.

The public highways of the state are built and maintained by public funds derived from various sources of taxation. Their construction and maintenance are a charge upon the people of the state, and it is not only the right, but the duty, of the state, to prohibit their use by motor vehicles, that by reason of their great weight or other reasons, are likely to impair and seriously injure the roads. In the exercise of this power the regulations and prohibitions must be just and reasonable, and not such as would impair the reasonable use of the highways by the public. We find, therefore, that the prohibition of the use on the public highways outside of municipalities, of motor vehicles of certain weights enumerated in article 5 of the act amending section 1011, Revised General Statutes, is not unreasonable when considered in connection with the character of our existing public highways.

State ex rel. Bonsteel v. Allen, 26 A. L. R. 738.

Notice to a party where rights are to be affected by judicial proceedings is an essential element of due process. But in the exercise of legislative function notice is not essential, as where one is affected by exercise of police power.

12 Corpus Juris, p. 1228, § 1006.

Of course, the courts are open to appellant to challenge the validity of the ordinance, as in attempting to exercise the police power, but if the act was one of legislative character and was not judicial, the appellant was not entitled to a hearing on the question of whether the ordinance should be passed.

Pittsburg, Cincinatti & St. Louis R. R. Co. v. City of Hartford, 170 Ind., 674, 680.

It is quite certain, however, that so far as sidewalk assessments are concerned it has been strictly held that a provision for notice to the property owner before the construction or repair of the sidewalk is not essential to the validity of the law. *Hennessey v. Douglas Co.*, 99 Wis. 629; 74 N. W. 983.

Lake Avenue L. Co. v. Lake, 134 Wis. 470, 475.

The legislature has power, and has exercised it in countless instances, to enact general laws upon the subject of general health and safety without providing that the people who are to be affected by these laws shall first be heard before they take effect in a particular case. The fact that the legislature has chosen to delegate a certain portion of its power to a board of health would not alter the principle, nor would it be necessary to provide that the board should give notice and afford a hearing to the owner before it made such order. Laws and regulations of the police nature are not unconstitutional. Although no provision is made for such a disturbance, they do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffers injury to his health it is (*damnum asbque injura*) or, in theory of the law, he is compensated for it in sharing in the general benefits which the regulations are intended and calculated to secure.

So in the present case, while no notice may have been given the railroad company of the pendency of the ordinance, and while they may not have been invited to participate in the proposed legislation, yet they had an opportunity to and did in fact put in issue by the answer both the validity of the ordinance and the reasonableness of the amount appropriated to them respectively for the repair of the viaduct in question. The validity of the statute and of the ordinance having been passed upon and upheld by the courts of the state, it is not the function of this court apart from the provision of the federal constitu-

tion supposed to be involved, to declare state enactments void because they may seem doubtful in policy and may inflict a hardship in the particular instance.

Chicago R. R. Co. v. Neb. 170 U. S. 67, 76, 77.

Butterfield v. Stranahan, 192 U. S. 470, 497.

Control of Georgia R. Co. v. Railroad Commission of Alabama, 209 Fed. 75, 78.

(*People ex rel. v. Board of Health*, 140 N. 1, 6.)

The legislature has power, and has exercised it in countless instances, to enact general laws upon the subject of the public health and safety, without providing that the parties affected by the laws shall first be heard before they shall take effect in any particular case. * * * The fact that the legislature has chosen to delegate a certain portion of its power to the board of health, and to enact that the owners of certain tenement houses should be compelled to furnish water after the board of health so directed, would not alter the principle; nor would it be necessary to provide that the board should give notice and afford a hearing to the owner before it made such order.

Health Department v. Rector, etc., 145 N. Y. 32, 40, 42.

State v. McGuire, 109 Minn. 88, 92.

Goodrich v. Detroit, 184 U. S. 432, 437.

22 Sup. Ct. Rep. 397.

IX

THE ORDER DOES NOT INFRINGE UPON
THE CONSTITUTIONAL RIGHTS OF THE
DEFENDANT AS PROVIDED BY THE FOUR-
TEENTH AMENDMENT.

The public highways of the state are constructed and maintained at public expense in taxation and enforced personal labor, and the privilege of using them may be conditioned upon the observance of prescribed regulations for the conservation of the highway and the public safety and comfort, and upon payment of private or licensed taxes upon vehicles; the matter of extent of the regulation and taxes to be within the legislative discretion, provided no unjust or arbitrary discriminations are imposed in the statutory regulation or legislation and due process of law is observed in enforcing the enactment. *Hendrick v. State of Maryland*, 235 U. S. 610; *Kane v. N. J.*, 242 U. S. 160; 37 Sup. Ct. Rep. 30.

All property is acquired and held and used subject to the proper assertion of lawful governmental power. The acquisition of heavy-weight motor vehicles can not prevent the proper exercise of police power of the state to conserve the public highways by limiting the weight of such vehicles as may be in operation on the public roads, even though some heavy-weight vehicles previously used on the highways were not excluded therefrom by the statutory regulation. The organic provision securing private rights does not preclude reasonable regulation of the use of private property to preserve the public highways and to preserve the public safety and welfare, even if such regulation renders less valuable or curtails the use of the property already acquired, the public safety and necessity being superior to private property rights.

State ex rel. Bonsteel v. Allen, 83 Fla. 214, 228,
229.

The ordinance does not amount to a taking of property without just compensation, the regulation being a just exercise of police power. Appellant must submit to the requirements, even though it may be some expense or inconvenience upon him. There is too large a body of legislative regulations of this character which have received judicial sanction of the highest courts to make the proposition a debatable one.

Pittsburgh & R. Co. v. City of Hartford, 170 Ind. 674, 680.

And it is well settled that the enforcement of uncompensated obedience to a legitimate regulation established under the police powers is not the taking of property without compensation or without due process of law in the sense of the fourteenth amendment. *Chicago B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 255; 17 Sup. Ct. Rep. 581; *New Orleans Gas & Light Co. v. Drainage Commission*, 197 U. S. 453, 462; 25 Sup. Ct. Rep. 471; *Chicago B. & Q. R. Co. v. Ill.*, 200 U. S. 561, 591.

Chicago & Alton R. R. Co. v. Henry A. Transbarger, 238 U. S. 67; 35 Sup. Ct. Rep. 678, 682.

Every right, from absolved ownership in property down to a mere easement, is purchased and holden subject to the restrictions that it shall be so exercised as not to injure others. Although at the time it be remote and inoffensive, the purchaser is bound to know of its peril that it may become otherwise by the residence of many people in its vicinity, and that it must yield to bylaws and other regular limitations for the suppression of nuisances.

Fertilizing Co. v. Hyde Park, 97 U. S. 659, 668.

The fourteenth amendment to the constitution of the United States does not destroy the power of the state to enact police regulations as to the subjects within their control, *Barber v. Connolly*, 113 U. S. 73, 31; *Minneapolis & St. Louis Ry. Co. v. Beckwith*, 129 U. S. 26, 29; *Giozza v. Tiernan*, 148 U. S. 657; *Jones v. Brim*, 165 U. S. 180, 182; and does not have the effect of creating a particular and personal right in the citizen to use public property in defiance of the constitution and laws of the state.

Patterson v. Kentucky, 97 U. S. 501, 505.

The defendant claims that he has made investment in reliance upon the former regulation, but as pointed out in *Lane v. Whitaker*, 275 Fed. 476, 479, supra, section VI of brief, such investments are made subject to other regulations that legislature may reasonably enforce for public safety, welfare and convenience.

Furthermore, the facts of this case demonstrate that the order made by the commission preserves the very foundation of plaintiff's business and instead of encroaching upon his property rights it defends them against his own attack, for without good roads he is helpless. This is a common result of the exercise of police powers, as pointed out in *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 210, where the court says: "Viewed, then, as a statute to protect or to prevent the waste of the common property of the surface owners, the law of the state of Indiana which is here attacked because it is asserted that it divested private property without due compensation, in substance, is a statute protecting private property, and preventing it from being taken by one of the common owners without regard to the enjoyment of others," * * *. In short this order protects others interested in interstate commerce, it protects the plaintiff's interest and thereby furthers interstate commerce, the purpose of the general government in the act of 1917.

X

WHETHER THIS BE A CONTRACT FOR THE DEFENDANT'S BENEFIT OR A LAW UPON WHICH HE MAY REPOSE — IN EITHER EVENT HE IS SUBJECT TO REASONABLE REGULATION, THIS BEING AN EXERCISE OF POLICE POWER.

The power being essential to the maintenance of the authority of local government to the safety and welfare of the people is inalienable. As was said by Chief Justice Waite, referring to earlier decisions to the same effect: "No legislature can bargain away the public health and the public morals. The people themselves can not do it—much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies the moment may require. Government is organized with a view to their preservation, and can not divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and this discretion can not be parted with any more than the power itself." See *Butchers Union Co. v. Crescent City Co.* 111, U. S. 746, 743.

Stone v. Miss., 101 U. S. 814, 819.

The principle involved in these decisions is that where the legislative act is arbitrary and has no reasonable relation to a purpose which it is competent for a government to effect, a legislature transcends the limits of its powers in interfering with the liberty of the contract, but where there is a reasonable relation to an object within the governmental authority the exercise of the legislative discretion is not subject to judicial review. The scope of the judicial inquiry in deciding the question of power is not to be confused with the scope of legislative consideration in dealing with the matter of policy. Whether the enact-

ment is wise or unwise; whether it is based on sound economic theory; whether it is the best means to achieve the desired result; whether in short the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.

Chicago B. & Q. R. Co. v. McGuire, 31 Sup. Ct. Rep. 259, 263.

Congress is given power to promote the progress of science and the useful arts. To that end it may by all necessary and proper laws secure to inventors for limited times exclusive rights to their inventions. The power has been exercised in various statutes prescribing the terms and conditions upon which the letters patent may be obtained. It is true that letters patent, pursuing the words of the statute, do in terms grant to the inventor, his heirs and assigns, exclusive right to make, use and vend to others his invention or discovery throughout the United States and territories thereof, but obviously this right is not granted or effected without reference to the general powers which the several states of the union unquestionably possess over their purely domestic affairs, whether of international commerce or of police. "In the American constitutional system," says Cooley, "the power to establish the ordinary regulations of police has been left with the individual states, and can not be assumed by the national government." Cooley Const. Lim. 574. While it is confessedly difficult to mark precise boundaries of the powers or to indicate by any general rule the exact limitations which the state must observe in its exercise, the existence of such a power in the state has been uniformly recognized in this court. *Gibbons v. Ogden*, 9 Wheat. 1; *Gillman v. Philadelphia*, 3 Wall. 713; *Henderson et al. v. The Mayor of the City of N. Y.*, 92 U. S. 259; *Beer Co. v. Mass.*, supra, p. 25. It is impressed in what Mr. Chief Justice Marshall in *Gibbons v. Ogden* calls "that immense mass of legislation which can be most advanta-

geously exercised by the states and over which the national authorities can not assume supervision or control." "If the power only extends to a just regulation of rights, with a view to the due protection and enjoyment of all, and does not deprive any one of that which is justly and properly his own, it is obvious that its possession by the state and its exercise by the regulation of the property and actions of its citizens can not well constitute an invasion of the national jurisdiction or afford a basis for an appeal to the protection of the national authorities." *Cooley Const. Lim.*, 574.

It was held by Chief Justice Shaw to be a settled principle growing out of the nature of well ordered society that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. *Commonwealth v. Alger*, 7 Cush. 53. In recognition of this fundamental principle we have frequently decided that the police power of the state was not surrendered when the constitution conferred upon congress the general power to regulate commerce with foreign nations and between states; hence, the states may by police regulation protect their people against the introduction within their respective limits of infected merchandise. "A bale of goods upon which the duties have or have not been paid, laden with infection, may be seized to the health laws, and, if it can not be purged of its poison, may be committed to the flames."

Patterson v. Kentucky, 97 U. S. 501, 503, 505.

Davis v. Mass., 167 U. S. 43, 47, 48.

New Orleans Gas Co. v. La. Light Co., 115 U. S. 650, 672.

New Orleans v. Huston, 119 U. S. 265, 275.

Patterson v. Ky., 97 U. S. 501, 503, 505.

Holder v. Hardy, 169 U. S. 628, 631.

18 Sup. Ct. Rep., 383, 388.

XI

THE FEDERAL GOVERNMENT HAS ENGAGED IN THE CONSTRUCTION OF PERMANENT HIGHWAYS TO AID THE STATE IN ROAD CONSTRUCTION AND THE ESTABLISHING OF POST ROADS.

By an act of congress, July 11, 1916, clause 241, 39 Stat. 355, as amended February 28, 1919, c. 6940, Stat. 1189, 1200, and the federal act of November 9, 1921, c. 119, 42 Stat. 212.

The act itself is an expression of the fundamental principle of our government. Namely, a cooperation of all departments and divisions of government for the common good. The federal government extends aid to the state and the state constructs roads for the use of interstate commerce. Thus both function together in a manner that enables them to realize results that they could not realize by separate action. So we see the act is not an act to deprive either department of government of former power, but to add strength to the functioning of both.

With this in mind we look to past constructions, but upon like statutes.

While undoubtedly they are post roads under the United States statute of March 1, 1884, C. 9, enacting that "all public roads and highways, while kept up and maintained as such are hereby declared to be post routes," and whoever knowingly and willfully obstructs or retards the passage of the mail, or any carriage, horse, driver or carrier * * *" is upon conviction subject to fine or imprisonment, or both, by U. S. Rev. Sts. § 10371, U. S. St. of 1909, C. 321, § 201.

Compiled Statutes, 196, § 10371.

Yet the ways remain public ways laid out and maintained by the commonwealth which has the exclusive power, not only of alteration and of discontinuance, but to make and enforce reasonable regulations for their use. The facilities hereby afforded for transportation of the mails confer no extraordinary rights upon mail carriers to use the ways as they please, nor do they necessarily or impliedly do away with the power of supervision and control inherent in the state. *Commonwealth v. Breakwater Co.*, 214 Miss. 10; *Postal Telegraph Cable Co. v. Chicopee*, 207 Miss. 341, 350; *Dickey v. Turnpike Co.*, 7 Dana (Ky.) 113; *Seebright v. Stokes*, 3 How. 151; *Price v. Pennsylvania Railroad*, 113 U. S. 218, 221; *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92, 100, 102; *Martin v. Pittsburg & Lake Erie R. R.*, 203 U. S. 284; 27 Sup. Ct. Rep. 100, 101.

Commonwealth v. Clossen, 229 Mass. 329, 334.

It never could have been intended by congress of the United States in conferring upon a corporation of one state authority to enter the territory of any other state and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the state into which it thus entered, and was under no obligation to pay fair proportion of the taxes necessary to its support.

St. Louis v. Western Union Tel. Co., 148 U. S. 92, 102.

This does not sustain the plaintiff in his assertion that the state has lost its power to regulate the post roads.

XII

THE ORDER IS NOT A REGULATION OF
INTERSTATE COMMERCE, BUT A REGULA-
TION OF THE STATE HIGHWAYS UNDER
THE POLICE POWERS OF THE STATE.

This order is not open to the objection made by Mr. Justice Brandeis in *Buck v. Kykendall*, 267 U. S. 307, 315, namely: "Its primary purpose is not regulation with a view to safety or to conservation of the highway, but the prohibition of competition." It can not be said that the order in this case prohibits interstate commerce. It is true that it limits the amount of a given load, but it does not prohibit the amount of interstate commerce that the defendant may carry, nor does it in any way interfere with competition. It is a regulatory measure with a view to the safety of the public highways on which the people of the state of Oregon have spent many millions of dollars. Such regulations are sustained by an overwhelming weight of authorities, some of which are given below:

In the absence of national legislation covering the subject, a state may rightfully prescribe uniform regulation necessary to the public safety and order in respect to the operation of its highways, over all motor vehicles,—those moving interstate commerce as well as others—and to this end it may require the registration of such vehicles, of the license and of the drivers, charging therefor reasonable fees graduated according to horsepower of the engine, a particular measure of size, speed and difficulty of control. This is but an exercise of police power uniformly recognized as belonging to the state and essential to the preservation of health, safety and comfort of her citizens, and does not constitute a direct or material burden on interstate commerce. The reasonableness of the state's action is always subject to inquiry in so far as it affects interstate commerce, and in that regard it is likewise

subordinated to the will of congress. *Barbier v. Connolly*, 113 U. S. 27, 30, 31; 5 Sup. Ct. Rep. 357; *Smith v. Ala.*, 124 U. S. 465, 580; *Awlton v. Steel*, 15 U. S. 133, 136; *Holder v. Hardy*, 169 U. S. 366, 392.

Hendrick v. Maryland, 35 Sup. Ct. Rep. 140, 142; 235 U. S. 610, 622.

The mere fact that the order affects people engaged in interstate commerce is no reason for saying that it is an interference or an attempt to regulate interstate commerce. "Generally legislation of this kind prescribing the liabilities and duties of citizens of the state, without distinction as to pursuit or calling, is not open to any valid objection because it may affect a person engaged in foreign or interstate commerce. Objections might with equal propriety be urged against legislation prescribing the forms in which contracts shall be authenticated or property descend or be distributed on the death of its owner, because applicable to the contracts of estates or persons engaged in such commerce. In conferring upon congress the regulation of commerce it was never intended to cut the state off from legislating on all subjects relating to the life, health and safety of its citizens, although the legislation might indirectly affect the commerce of the country. Legislation in a great variety of ways may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the constitution, and it may be said generally that the legislation of a state not directed against commerce or any of its regulations, or relating to the rights, duties and liabilities of citizens, will only indirectly and remotely affect the operation of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or any other pursuit.

Smith v. Alabama, 124 U. S. 465, 474, 475.

It is also the law that the state may under its police power regulate and even exclude property that is dangerous to the property of the citizens of the state, even though it be a subject of interstate commerce, as pointed out in *Leisy v. Hardin*, 135 U. S. 153, 10 Sup. Ct. Rep. 681, 700; *Railroad Co. v. Husson*, 95 U. S. 465, 471.

Mr. Justice Strong states in *Railroad Co. v. Husson*, 95 U. S. 465, 471, that a state in the exercise of its police power could legislate to prevent the spread of crime or pauperism, or the disturbance of peace, as well as justify the exclusion of property dangerous to the property of citizens of the state, as, for instance, animals having contagious or infectious diseases. All these exertions of power are in immediate connection with the protection of persons and property against noxious acts of other persons, or such a use of property as is injurious to the property of others. They are self-defensive.

It is the settled construction of every regulation of commerce that under the sanction of its general laws no person can introduce into a community malignant diseases or anything which contaminates its morals or endangers its safety, and this is an acknowledged principle applicable to all general regulations that individuals in the enjoyment of their own rights must be careful not to injure the rights of others. From the explosive nature of gunpowder, a city may exclude it. Now this is an article of commerce and is not known to carry infectious disease; yet to guard against injuries a city may prohibit its introduction. These exceptions are always implied in commercial regulation where the general government is permitted to have exclusive power. They are not regulations of commerce, but acts of self-preservation, and, although they affect commerce to an extent, such effect is the result of the exercise of an endowed power in the state.

Leisy v. Hardin, 135 U. S. 100, 140.

Also:

5 Howard, 576, 590, 610, 618.

Incidentally affecting interstate commerce will not invalidate the act. *Kane v. N. J.*, 242 U. S. 160; *Hendrick v. Maryland*, 235 U. S. 610, Minn. rate cases, 230 U. S. 352; *Monongahela Nor. Co. v. U. S.*, 148 U. S. 312; *Covington Bridge Co. v. Ky.*, 154 U. S. 224.

Interstate Motor Transit Co. v. Kuykendall, 284 Fed. 882, 885.

Huse v. Glover, 119 U. S. 543, 548, 549, 550.

Packet v. Koekuk, 95 U. S. 80, 84.

XIII

CONGRESS HAVING MADE NO REGULATION IN REGARD TO THE USE OF THE HIGHWAYS, THE POWER IS VESTED IN THE LEGISLATURE OF THE STATE, BEING A LOCAL AND CONCURRENT POWER.

The doctrine declared in these several decisions is in accordance with a more general doctrine now generally established, that the commercial power of congress is exclusive of state authority only when the subjects upon which it is exercised are liberal in their character and admit and require uniformity of regulation affecting alike all the states. Upon such subjects only that authority can act which can speak for the whole country. Its nonaction is therefore a declaration that they shall remain free from all regulations. *Welton v. State of Mo.*, 91 U. S. 275; *Henderson v. Mayor of N. Y.*, 92 Ind. 259; *County of Mobile v. Kimball*, 102 Ind. 691.

On the other hand, where the subjects over which the power may be exercised are local in their nature or re-

place or constitute mere addition to commerce, the authority of the state may be exercised for the regulation and management until congress interferes and supersedes, as said in the case last cited. (Uniformity of commercial regulation which the grant to congress was designed to secure against conflicting state provisions, was necessarily intended only for cases where such uniformity is practicable. Where from the nature of the subject or the sphere of its operation the case is local and limited, special regulations adapted to the immediate location could only have been contemplated. State action upon such subjects can constitute no interference with commercial power of congress, for when that body acts the state authority is superseded. Action of congress upon these subjects of local nature or operation, unlike its inaction upon matters affecting all the states in requiring the uniformity of regulation, is not to be taken as the declaration that nothing shall be done in respect to them, but is rather to be deemed a declaration for the time being and until it sees fit to act, and may be regulated by the state authorities.)

Escanaba Co. v. Chicago, 107 U. S. 678, 687.

Either absolutely to assert or deny that the nature of this power requires exclusive legislation by congress is to lose sight of the nature of the subject of its power, and to assert concerning all of them, whether it is merely applicable but to a part, whatever subjects of this power are in their nature national or immediate only of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by congress. That this can not be affirmed by the laws for the regulation of pilots and pilotage is plain. The act of 1789 retains a great and alternative declaration by the first congress, that the nature of this subject is such that until congress should find it necessary to exert its power it should be left to the legislation of the state; that it is local and not national; that it is likely to be best provided for—not by one system or plan of regulation, but by as

many as the legislative discretion of the several states should deem applicable with the local peculiarities of the boards within their limits.

Cooley v. Board of Wardens of the Port of Philadelphia et al., 12 Howard, 229, 319.

Leisy v. Hardin, 135 U. S. 100, 119, 120.

Also:

Simpson v. Shepard, Min. Rate Cases, 57 L. Ed. 1511, 1542.

Gibbons v. Ogden, 9 Wheat I, 6 L. Ed. 71, 72.

Hendrick v. Maryland, 235 U. S. 610, 35 Sup. Ct. Rep. 140, 142.

XIV

THE QUESTION OF THE HIGHWAYS BEING PROPERLY MAINTAINED IS A QUESTION FOR THE FEDERAL GOVERNMENT, AS IS EXPRESSLY PROVIDED BY THE STATUTE, AND NOT A QUESTION SUBJECT TO COLLATERAL ATTACK BY THE DEFENDANT.

Section 7 of the act provides if at any time the secretary of agriculture should find that any road in any state, constructed under the provisions of this act, is not being properly maintained, he shall give notice of such fact to the highway department of such state, and if within four months from the receipt of said notice said road has not been put in proper condition of maintenance, then the secretary of agriculture shall thereafter refuse to approve any project for road construction in said state or the civil

subdivision thereof, as the fact may be, whose duty it is to maintain said road, until it has been put in a condition of proper maintenance. This specifically points out the way in which the general government is to supervise the maintenance of the highways, and, since it is a statutory act and the remedy is provided, this remedy must be followed as there is no common law remedy applicable to this situation.

Where a statute to attain a particular object prescribes the mode of procedure to enforce it, that mode must be pursued.

Lawson, Rights, Remedies and Practice, vol. 7, p. 5932, § 3777.

But where a statute creates a new right, and prescribes a remedy for its violation, the remedy thus prescribed is exclusive.

25 R. C. L., § 283, p. 1058.

Cal. v. John Craycroft, 2 Cal. 243 at 244.

Andover and Medford Turnpike Corp. v. Gould, 6 Mass. 39, 43.

Refutation

We were of necessity required to prepare our brief in advance of receipt of a copy of appellants' brief, and for that reason we have not in the brief proper given specific attention to the several points relied upon by the appellants. We, therefore, meet appellants' argument under the above topic.

APPELLANTS HAVE NEITHER IN THEIR BRIEF NOR IN THEIR PLEADINGS ESTABLISHED OR SUSTAINED ANY RIGHT, IN FACT OR IN LAW, TO THE RELIEF DEMANDED, for

1. The premise upon which they predicate their argument is false and illogical.
2. The deductions and conclusions raised are unwarranted and erroneous.

False and Illogical Premise:

The premise upon which appellants seek to advance their argument assumes that the Oregon statute and the order of the Oregon commission does violence to the interstate commerce clause of the federal constitution, and assumes further that such law and order offend the provisions of the said federal aid act, and further assumes that a contract between the federal government and the State of Oregon exists for the benefit of appellants.

In the first place there has not been disclosed by appellants, and we challenge them to show that congress has ever legislated with respect to the regulation of public highways, such as is provided for in the Oregon law and by the Oregon commission. The Oregon law (chapter 371, General Laws of Oregon, 1921, as amended), which is the law to which the Oregon Highway Commission points for

its authority, by its terms declares the statute to be an exercise of the police powers of the State of Oregon. Section 51 of said chapter declares "the provisions of this act are declared to be an exercise of the police powers of the state, and this act shall be known as the 'Oregon motor vehicle law'."

Section 52 of this said act declares: "The purpose, object and intent of this act provides a comprehensive system for the regulation of motor and other vehicles in this state. * * *"

In passing upon this law, the Oregon supreme court said:

The character of the registration fees may be determined from the act.

Section 51 of Chapter 371, General Laws of Oregon of 1921, enacts:

"The provisions of this act contained are declared to be an exercise of the police powers of the State of Oregon, and this act shall be known as the 'Oregon Motor Vehicle Law'."

While not absolutely controlling, the legislative designation is an important factor in determining the character of the tax imposed: *Portland v. Portland Ry. Light & Power Co.*, 80 Or. 271, 305 (156 Pac. 1058), citing Gray, *Lim. of Tax. Power*, p. 42; *Briedweil v. Henderson*, 99 Or. 506, 514 (195 Pac. 575).

Among the powers expressly granted to the national government is the control of interstate commerce. Article I, section 8, of the Constitution, provides that

"The congress shall have power * * * to regulate commerce with foreign nations, and among the several states * * *."

Congress has exercised the power granted it in relation to interstate commerce in a variety of acts; but it has passed no statute that in any way inhibits the exaction by

the state of the fees in question by way of compensation from the plaintiff for the privilege of driving its motor cars over the highways of this state.

State laws may affect interstate commerce without conflicting with the constitutional provision appealed to.

Camas Stage Co., Inc. v. Kozer, 104 Or. 600.

The Oregon supreme court in its opinion in the above entitled case reviews a number of United States supreme court decisions supporting the comment and opinion of the Oregon supreme court, and in that opinion the Oregon supreme court cites the following authorities:

Transportation Co. v. Parkersburg, 107 U. S. 691, 699 (27 L. Ed. 584, 2 Sup. Ct. Rep. 732, see, also, Rose's U. S. Notes).

Huse v. Glover, 119 U. S. 543 (30 L. Ed. 487, 7 Sup. Ct. Rep. 313).

Lindsay & Phelps Co. v. Mullen, 176 U. S. 126 (44 L. Ed. 400, 20 Sup. Ct. Rep. 325).

Kane v. New Jersey, 242 U. S. 160 (61 L. Ed. 222, 37 Sup. Ct. Rep. 30) affirming 81 N. J. L. 594 (80 Atl. 453, Ann. Cas. 1912D, 237).

Appellants have cited many provisions of the act of congress known as the federal aid act, but we are unable to find wherein they have cited or pointed out a provision which takes from the State of Oregon jurisdiction over its highways, or denies to the state the right to regulate or police its highways. The authority given to the secretary of agriculture by the terms of the federal act is an authority which goes to the subject of highway construction and not highway use or highway regulation.

Appellants' premise is false and illogical on their further assumption that the acceptance by the State of Oregon of the terms and provisions of the federal highway act and the pledge of the state to cooperate with the federal government in the construction of roads created a contract for the benefit of appellants.

It will be noted that the provisions of the federal highway act call for cooperation between the state, through its State Highway Department, and the federal government, through the secretary of agriculture, and so long as that cooperation exists to the satisfaction of the representative of the federal government and the representative of the state the terms of the act are satisfied, and it does not lie within the privilege of appellants to declare or show that the State of Oregon is delinquent.

Deductions and Conclusions Erroneous:

Having assumed that congress has legislated on the subject of regulation of public highways, and having assumed that the acceptance by the State of Oregon of the terms of the federal highway act resulted in a surrender of the jurisdiction of the state over its own highways, and having assumed that the federal act and the Oregon statute became a contract between the State of Oregon and the federal government for the benefit of appellants,

appellants then proceed to outline and disclose evils and burdens which they claim befell them and their business, and because of those alleged evils and burdens they ask that the State of Oregon and its highway commission be restrained from enforcing the Oregon law having for its object and purpose the welfare of the general public and the preservation of its highways.

The language of the federal legislation and the language of the Oregon legislation applicable to the subjects under discussion, together with the rules and regulations of the secretary of agriculture covering the matter of highway construction as contemplated by the federal law and the order of the Oregon State Highway Commission, which order is now challenged, are all reproduced in the appendix which is a part of this brief. A casual reading of these several provisions will promptly reflect and disclose the erroneous, illogical and unwarranted position taken by the appellants.

The false and erroneous conclusions of appellants are especially manifest when one reads and reviews the authorities cited in support of their position.

On page 23 of their brief, in large type, they make the general statement that the state has surrendered complete jurisdiction of the highways which fall under the federal aid act. They, however, fail to point out the portion of the federal act which sustains them in this conclusion, and, as stated before, we are not able to find anywhere that the act provides such a blanket statement. It is true that the secretary of agriculture has a right to demand certain requirements with respect to construction and repair. Further than that the state makes no surrender of its sovereign power. A state legislature can not grant away its police powers even if it so desires (page 16 of appellees' brief, section V). No such attempt has been made

on the part of the state to surrender, or the federal government to take over, the regulation of the highways. The following cases cited by appellants merely point out that the federal government could enforce its contracts entered into between the state or states and the federal government:

Searight v. Stokes et al., 3 How. 151, 11 L. Ed. 537.

Neil, Moore & Co. v. Ohio, 3 How. 720, 11 L. Ed. 800.

Achison v. Hudleson, 12 How. 293, 13 L. Ed. 993.

State of Indiana v. U. S., 148 U. S. 148, 37 L. Ed. 401.

U. S. v. California & Oregon Land Co., 148 U. S. 31, 37 L. Ed. 354, 356, 362.

U. S. v. Dalles Military Road Co., 140 U. S. 599, 35 L. Ed. 561, 562.

U. S. v. Union Pacific R. Co., 160 U. S. 1, 40 L. Ed. 319.

Lake Superior, etc. R. R. Co. v. U. S., 93 U. S. 442, 23 L. Ed. 965.

Grand Trunk Western R. Co. v. U. S., 252 U. S. 112; 64 L. Ed.

Wisconsin Central R. Co. v. U. S., 164 U. S. 190; 41 L. Ed. 399.

We concede that the question is well settled that government contracts, like all other contracts, are enforceable, but these cases in no way sustain the proposition that the federal aid act gives the federal government complete jurisdiction of the highways. The case of *Pensacola Tel. Co. v. W. U. Tel. Co.*, 96 U. S. 1, 24 L. Ed. 708, which appellants refer to on page 25 of their brief, was a case of the Florida legislature giving exclusive control of the operation of telegraph communications within two counties that so separated the rest of the state that it prohibited other companies from operating in the adjoining territory,

and for that reason the supreme court held that it was a prohibition, and, therefore, an interference with interstate commerce; but the order of the commission and question in this case is not a prohibition but a regulatory measure.

Nielsen v. Or., 212 U. S. 315, 319, 53 L. Ed. 528, 529, cited on page 32 of appellants' brief, raises a question of jurisdiction in Washington and Oregon in regard to the Columbia river, and hinges on a territorial question of jurisdiction and does not sound in a question of governmental jurisdiction, thus having no point in this case. *State of New Jersey v. Wilson*, 7 Cranch. 165, 3 L. Ed. 303, and *Buck v. Kuykendall*, 267 U. S. 307, are cited merely to reiterate that a general government contract is enforceable.

Appellants contend that the term "rules and regulations" as used in the federal act, give complete jurisdiction to the secretary of agriculture over the highways given aid by the federal government. A reading of the said act will show that this grant of power to the secretary of agriculture only extended to the making of rules and regulations needed to carry out the body of the act or the provisions of the act when a state had accepted the conditions. It does not mean rules and regulations for the purpose of controlling all the government functions needful in operating and caring for a great system of highways.

In sustaining our interpretation we cite the words of the act of July 11, 1916, ch. 241, 39 Sta. L. 355, sec. 6:

The construction work and labor in each state shall be done in accordance with its laws, and under the direct supervision of the state highway department subject to the inspection and approval of the secretary of agriculture and in accordance with the rules and regulations made pursuant to this act. * * *

Thus it will be seen that the state has complete jurisdiction and supervision of the project, and that the secretary of agriculture only acts as an inspector thereof in behalf of the federal government. It can not be seriously contended that the state has surrendered its control of the highways until some act has been set out showing at least an attempt to do so. Furthermore, the state legislation with respect to the matter under consideration has furnished adequate state laws for the complete supervision of the state highways, which is opposed to appellants' contention. The federal government has passed no laws for the supervision of the state highways; therefore, the jurisdiction must rest with that department of government which exercised it prior to the passing of the acts herein set forth.

The term "State Highway Department," as used in the federal act, indicates that the state shall retain its jurisdiction over its highways. The definition reads as follows, in the act of July 11, 1916, ch. 241, 39 Stat. L. 355, sec. 2:

The term "State Highway Department" shall be construed to include any department of another name, or commission, or official or officials of a state empowered under its laws to exercise the functions ordinarily exercised by a state highway department.

Act of November 9, 1921, ch. 119, Stat. L. 42, 272, sec. 18:

That the secretary of agriculture shall prescribe and promulgate all needful rules and regulations for the carrying out of the provisions of this act, including such recommendations to congress and the state highway departments as he may deem necessary for preserving and protecting the highways and insuring the safety of traffic thereon.

This section would seem to indicate that if the secretary of agriculture desires any special regulations in regard to the preservation of highways he must secure it through congress or the state highway department. Furthermore, the act of February 12, 1925, ch. 219, 43 Stat. L. 889, sec. 3, provides "that in any state where the existing constitution or laws will not permit the state to provide revenues for the construction, reconstruction or maintenance of highways, the secretary of agriculture shall continue to approve projects for said state for the period covered by this act if he shall find that said state has complied with the provisions of this act in so far as its existing constitution and laws will permit"; thus making it possible for the United States to aid a state in the construction of highways where its constitution will not even permit of appropriation of funds for such special purposes. It is apparent that it was the purpose of congress to aid the states rather than to usurp state control over highways.

The cases cited under paragraph III, page 34 of appellants' brief, with the exception of *Buck v. Kuykendall*, 267 U. S. 307, are railroad rate cases, and are not in point, or in harmony with the theory advanced by the appellants in their argument set forth therein for, while it is true that proper parties have a right to be heard as to whether rates are reasonable as provided by rate commissions, yet it is common knowledge that the exercise of a police power does not fall under this rule, and the mere fact that the appellant has been a loser through the exercise of police power gives him no reason or ground for complaint, as established in brief, supra, page —; also in the following authority:

It is said that if the same requirement were made for the other grade crossings of the road, it would soon be bankrupt. That the states might be so foolish as to kill

a goose that lays golden eggs for them has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change, it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil. *Denver R. & G. R. Co. v. Denver*, 250 U. S. 241, 246, 63 L. Ed. 958, 962, 39 Sup. Ct. Rep. 450. To engage in interstate commerce the railroad must get on to the land; and, to get on to it, must comply with the conditions imposed by the state for the safety of its citizens. Contracts made by the road are made subject to the possible exercise of the sovereign right. *Denver & R. G. R. Co. v. Denver*, 250 U. S. 241, 244, 63 L. Ed. 958, 961, 39 Sup. Ct. Rep. 450; *Union Dry Goods Co. v. Georgia Public Service Corp.*, 248 U. S. 372, 63 L. Ed. 309, 9 A. L. R. 1420, P. U. R. 1919C, 60, 39 Sup. Ct. Rep. 117; *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671, 31 Sup. Ct. Rep. 265.

In *Buck v. Kyhkendall*, 267 U. S. 307, the court said that the act was not a regulatory measure, but the prohibition of competition. Therefore, the case has no weight in relation to the proposition under consideration in this case, as the order of the commission was not a prohibition of competition, nor even an attempt to regulate competition, but rather an attempt to regulate the use of the highways in such manner that they would be preserved for the public good.

NEITHER THE STATE OF OREGON NOR ITS HIGHWAY COMMISSION IS DENIED BY THE FEDERAL CONSTITUTION, BY ACT OF CONGRESS, OR BY COURT DECISION THE RIGHT TO POLICE AND REGULATE THE USE OF THE PUBLIC HIGHWAYS.

The subject of statutory regulation of motor vehicles is in some respects new. Transportation by motor vehicle

is an evolution. It is expanding and developing beyond conjecture or imagination, and both the states and the federal government must, to a large extent, pioneer in the matter of regulation. Those principles of law which have guided courts in the past with respect to subjects of transportation are not certain and unfailing guides with respect to the regulation of the motor vehicle. Heretofore the movement of passengers or freight has been upon carriers which moved upon rolling stock and roadbeds owned or controlled by the carriers, but the motor vehicle is moving upon a roadbed owned, built and maintained by the public. Therefore, there is presented a dual ownership—one the public, the other private owners; hence we repeat that those principles of law which have guided law-making bodies and courts in dealing with the subject of transportation of property or persons can not be relied upon as a complete guide either in the making of law or in the construction of law, or in its administration, when that law and the administration has to do with the motor vehicle.

The subject of regulation of the motor vehicle has been before this court on several occasions. Prominent among the cases considered by this court are the following:

Buck v. Kuykendall, U. S. Adv. Opinions No. 10, p. 301; 69 L. Ed.

Duke v. Public Utilities Commission of Mich., vol. 45, No. 7; Adv. Sheets Supreme Court Reporter, p. 191; 69 L. Ed.

Bush v. Maloy et al., U. S. Court Adv. Opinions No. 10, 303; 69 L. Ed.

Marion L. Frost et al. v. Railroad Commission of California, U. S. Sup. Ct. Adv. Sheets No. 16, p. 682.

As we read the opinions of the court in the above cases, the right of the state to regulate the use of its public highways has always been recognized and conceded. In fact, in the last case, which was *Frost v. Railroad Commission of California*, supra, and which was a case involving the right of the State of California to regulate the use of its highways and to license motor vehicles using those highways for the purpose of carrying passengers or freight for hire, the court said: "There is involved in the inquiry not a single power, but two distinct powers. One case—the power to prohibit the use of the public highways in proper cases—the state possesses; and the other—the power to compel a private carrier to assume, against his will, the duties and burdens of a common carrier—the state does not possess."

We find nothing in the Oregon law, or in its administration by the Oregon State Highway Commission, which is in conflict with the federal constitutional provision, federal act, or the decisions of this court.

Conclusion

We conclude this brief as we began it, by urging that appellants are not entitled to relief for the reason that they have not brought themselves within the provisions of any rule of law or within the scope of any statute, state or federal, which offers or guarantees the protection they demand.

The Oregon law and the conduct of the Oregon Highway Commission are not at enmity with any provision of the federal constitution, nor do they offend against any act of congress. The State of Oregon is quite within its rights when it, by legislative act, attempts to regulate traffic on its public highways. The rights and privileges of appellants are not paramount to the best interests of the general public. Appellants have a right to the use and enjoyment of the public highways, but when their activities and use of the highways becomes so burdensome as to destroy the highways, then they must yield to reasonable regulation. To uphold the appellants in their demand that the public highways be maintained at any cost for the comfort and commerce of appellants will result in the imposition of a financial burden beyond the capacity or available revenues of the state. The commerce now enjoyed by the appellants is the result of good roads, but there is a limit beyond which the public can not go in the expenditure of money for the construction and maintenance of highways. The demands of appellants and those similarly engaged are fast forcing the public to that financial limit.

On the theory advanced by appellants, the welfare of the general public or the financial stability of the state are not matters of concern in the face of privileges which they claim are guaranteed under the federal constitution and the federal aid highway act, and they ask

is court, as they asked the court below, to restrain the state of Oregon, through its State Highway Commission, from preserving for the general public its improved highways. This they ask on their showing that interstate commerce has been unduly burdened, that the provisions of the federal aid act have been violated, and that imaginary contractual relations have been disturbed. Appellants, we contend, have not brought themselves within the authority or power of this court to grant the relief they demand.

Respectfully submitted,

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Appendix

Act of Sixty-fourth Congress of the United States of America, approved July 11, 1916, Chapter 241, 39 S t. L. 355.

Title of Act: "An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes."

SEC. 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the secretary of agriculture is authorized to cooperate with the states, through their respective state highway departments, in the construction of rural post roads; but no money apportioned under this act to any state shall be expended therein until its legislature shall have assented to the provisions of this act, except that, until the final adjournment of the first regular session of the legislature held after the passage of this act, the assent of the governor of the state shall be sufficient. The secretary of agriculture and the state highway department of each state shall agree upon the roads to be constructed therein and the character and method of construction: *Provided*, that all roads constructed under the provisions of this act shall be free from tolls of all kinds.

SEC. 2. That for the purpose of this act the term "rural post road" shall be construed to mean any public road over which the United States mails now are or may hereafter be transported, excluding every street and road in a place having a population, as shown by the latest available federal census, of 2,500 or more, except that portions of any street or road along which the houses average more than 200 feet apart; the term "state highway department" shall be construed to include any department of another name, or commission, or official or officials, of a state empowered, under its laws, to exercise the functions ordinarily exercised by a state highway department; the term "construction" shall be construed to include reconstruction and improvement of roads;

"properly maintained" as used herein shall be construed to mean the making of needed repairs and the preservation of a reasonably smooth surface considering the type of the road; but shall not be held to include extraordinary repairs, nor reconstruction; necessary bridges and culverts, shall be deemed parts of the respective roads covered by the provisions of this act.

CREATION AND POWERS OF OREGON STATE HIGHWAY COMMISSION

Section 1, article 2, chapter 237, General Laws of Oregon, 1917:

SECTION 1. *Highway Commission.* There is hereby created a state highway commission, which shall consist of three members to be appointed by the governor, one from each congressional district of the state, to hold office for a period of three years; provided, however, that the members forming the first commission hereunder, who shall be appointed within 30 days after the passage of this act, shall serve as follows: One commissioner up to and including March 31, 1918, and one commissioner up to and including March 31, 1919, and one commissioner up to and including March 31, 1920. Before the expiration of the term of a commissioner, the governor shall appoint his successor to assume his duties on April 1st next following; provided, however, in case of a vacancy for any cause, the governor shall make an appointment to become immediately effective for the unexpired term; said successor to be appointed from the same congressional district in which the vacancy occurs.

SECTION 5. Said commission shall have the power to carry out the provisions of this act and its duties shall be such as are provided herein. The commission is hereby authorized to make such rules and regulations as it may deem necessary. Said commission shall have general supervision over all matters pertaining to construction of state highways, letting of contracts therefor and the selection of materials to be used in the construction of state highways, under the authority of this act,

and the commission is hereby authorized and empowered to purchase or contract for, independent of any specific or particular job, improvement or road construction work, whether the same be done by contract, force account or otherwise, any material, supplies or equipment necessary or deemed necessary for the carrying out of the provisions and purposes of this act, in such quantities and amount and in such manner as in the judgment of the commission will be for the best interest of the state. Said commission is authorized, under direction of the attorney general, to employ counsel, fix his duties and provide his compensation. Said commission shall meet at such times and for such periods in the office of the highway department, or at such other place as it may select, for the transaction of any business that may be necessary for the satisfactory execution of the provisions of this act. The commission shall also determine and adopt the general policy of the highway department and decide questions relating to the administration of the department. The commission shall publish an annual report to the governor containing the report of the engineer and such general information as may appear desirable regarding the construction, improvement or maintenance of highways and bridges, and other information gathered and available in the office of the highway department. Said commission shall designate, construct or cause to be constructed a system of state highways within the state of Oregon, which highways shall be designated by number, and by the point of beginning and terminus thereof. That the legislature of the State of Oregon hereby assents to the provisions of the act of congress, approved July 11, 1916, entitled "An act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes" (39 United States Statutes at Large, p. 355.) The state highway department is hereby authorized to enter into all contracts and agreements with the United States government relating to the survey, construction or improvement and maintenance of roads under the provisions of the said act of congress, to submit such scheme or program of construction or improvement and maintenance as may be required by the secretary of agriculture, and do all other things necessary fully to carry out the cooperation contemplated and provided for by the said act. For the construc-

tion or improvement and maintenance of rural post roads the good faith of the state is hereby pledged to make available funds sufficient to equal the funds apportioned to the state by or under the United States government during each of the five years for which federal funds are appropriated by section 3 of the said act, and to maintain the roads constructed or improved with the aid of funds so appropriated and to make adequate provisions for carrying out such maintenance. The good faith of the state is further pledged to make available funds at least sufficient when combined with the funds made or to be made by the several counties to equal the sum apportioned to the state by the secretary of agriculture under the rules and regulations approved by him for carrying out section 8 of the act of congress; provided, that funds made so available from the state highway fund shall be spent only upon the highways comprising the system of state roads; and the good faith of the state is further pledged to maintain such roads and to make adequate provisions for carrying out such maintenance, and other acts of congress for similar purposes. The state highway commission is hereby authorized and empowered to enforce all laws now in effect and which may hereafter be enacted and which relate to highways and to the operation of vehicles thereon within the state of Oregon and to arrest the violators of any of the provisions of the laws of the State of Oregon which are applicable to highways or to the movement of vehicles thereon, and the said state highway commission in exercising the powers hereby granted may, in its discretion, appoint and employ such deputies and other assistants as it may deem necessary to properly enforce such laws, and it is authorized to pay all necessary expenses out of the highway fund, and the secretary of state is hereby authorized to audit all claims approved by the state highway commission for this purpose in the same manner in which claims of the state highway commission for other purposes are audited and paid. Any person deputized or delegated with authority by the state highway commission to enforce the laws of the State of Oregon relative to highways, or to the movement of vehicles thereon, shall have authority to arrest without writ, rule, order, or process any person or persons detected by him in the act of violating any of the provisions of the laws of this state relat-

ing to highways, or to the movement of vehicles thereon, and all persons so deputized or delegated are hereby made peace officers of this state for that purpose and shall have authority to execute all process issued for the violation of any of the laws of the State of Oregon relating to highways, or to the movement of vehicles thereon. Any person who knowingly or wilfully resists or opposes such officer in the discharge of his said duties shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished as provided by law.

ACCEPTANCE BY STATE OF OREGON OF AID OFFERED BY FEDERAL GOVERNMENT

Chapter 175, General Laws of Oregon, 1917. Title of Act:

To accept the benefits of the act passed by the Sixty-fourth Congress of the United States, entitled "An act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes," and to provide for the issuance of bonds of the State of Oregon to raise such money as may be required to meet the requirements of said federal statute, and to authorize the state board of control to take such action and perform such duties as may be necessary to meet the requirements of said federal act and federal officials acting under said act.

Be It Enacted by the People of the State of Oregon:

SECTION 1. That the State of Oregon hereby accepts the provisions of said act and agrees to cooperate with the federal government in carrying out the provisions thereof.

SECTION 3. The state board, commissioners or officers having control of the state highways in the state of Oregon are hereby authorized, empowered and directed to enter into such contracts, appoint such officers and do any other act or thing necessary to fully meet the requirements of the United States and the officers acting under said federal statute.

MOTOR VEHICLE LAW OF OREGON

Section 36, chapter 371, General Laws of Oregon, 1921, as amended by chapter 10, General Laws of Oregon, 1921, Special Session, as amended by chapter 145, General Laws of Oregon, 1923.

Whenever the highway commission or any county court or board of county commissioners of any county of this state shall find that any public highways of the state or section thereof is being damaged by reason of being subjected to any particular kind or character of traffic, or shall find that, in the judgment of the state highway commission or of the county court or board of county commissioners of any county of this state, it would be for the best interests of the state or county and for the protection from undue damages of any highway or highways or of any section or sections thereof and, with respect to such highways or any sections thereof, to reduce the maximum weights and speeds in this act provided for vehicles moving over or upon the highways of this state, or if, in the judgment of the state highway commission or of any county court or board of county commissioners of any county of this state, it would be for the best interests of the state or of the county and for the protection from undue damage of any highway or highways or of any sections thereof to close such highway or highways or any sections thereof for any or all traffic or for any particular class of traffic, or for the moving thereon of any kind, size or weight of vehicles or any kind of commodity, freight or thing, then, in that event, the state highway commission or the county court or board of county commissioners of any county may, and is hereby authorized and empowered to, determine and fix the reduced weights and speeds, which shall be the maximum weights and speeds for vehicles or things moving over such highway or highways or any section thereof, and/or to prohibit the use of such highway or highways or any section or sections thereof for moving thereon any kind, size or weight of vehicle or any kind of commodity, freight or thing, for such period or periods of time as, in the judgment of said state highway commission or county court or board of county

commissioners, will be for the best interest of the state or county; provided, that the authority herein granted shall not authorize the closing of any road or section thereof to the movement or transportation thereover of products of the soil by persons having no other road or highway upon which to travel, but the hauling of such products over such highway shall be subject to the rules and regulations of the county court, board of county commissioners of any county of the state or the state highway commission, as the case may be. This proviso, however, does not apply when it becomes necessary to close any road during construction. The highway commission or any county court or board of county commissioners of the respective counties of this state may make and include in such order any rule or regulation not inconsistent with the foregoing provisions and authority for the preservation and protection of any public highway or section thereof, and any violation of any of the rules, regulations, terms, conditions or provisions of said order shall be deemed a violation of the provisions of chapter 371, General Laws of Oregon, 1921, as amended by chapter 8, General Laws of Oregon, 1921, and any person or corporation who violates any of the said provisions or any part of said order shall, upon conviction thereof, or upon entering a plea of guilty, be punished by a fine of not to exceed \$400 or by imprisonment in the county jail for not to exceed one year, or by both such fine and imprisonment in the discretion of the court. The state highway commission or the county court or board of county commissioners, as the case may be, shall post a notice in a conspicuous manner and place, so it can be readily seen and read, at each end of any highway or section thereof, for which limitations of traffic, as in this section provided, have been determined and fixed. Such notice shall state plainly the limitations or prohibitions of traffic determined and fixed, provided, that the authority granted in this section to the county courts or boards of county commissioners shall be limited to county roads and shall not extend to state highways over which the state highway commission is hereby granted exclusive control, and the said authority granted in this section to the state highway commission shall, as to said commission, be limited to state highways only. [Laws 1921, Special Session, c. 8, § 10, pp. 29, 30; Laws 1923, c. 145, § 1, pp. 204-206.]

RULES AND REGULATIONS OF THE SECRETARY OF AGRICULTURE FOR CARRYING OUT THE FEDERAL HIGHWAY ACT (EXCEPT THE PROVISIONS THEREOF RELATIVE TO FOREST ROADS)

Regulation 1—Definitions

SECTION 1. For the purposes of these regulations, the following terms shall be construed, respectively, to mean:

Act—The act of congress approved July 11, 1916, entitled "An act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes" (30 Stat. 355), as amended by the act of congress approved February 28, 1919, entitled "An act making appropriations for the service of the postoffice department for the fiscal year ending June 30, 1920, and for other purposes" (40 Stat. 1200, 1201), and as amended by the act of congress approved November 9, 1921, entitled "An act to amend the act entitled 'An act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes,' approved July 11, 1916, as amended and supplemented, and for other purposes" (Public, No. 87, 67th Cong.).

Secretary—The secretary of agriculture of the United States.

Bureau of Public Roads—The bureau of public roads of the United States department of agriculture.

Authorized representatives of the Secretary—The chief of the bureau of public roads and such other officials and employees thereof as he may designate from time to time.

Federal aid highway system—The system of federal aid highways, established by actual agreement and joint action of the states and the secretary of agriculture, and upon which all federal aid funds shall be spent.

Primary highways—The primary or interstate portion of the federal aid highway system composed of not to exceed three-sevenths thereof.

Secondary highways—The secondary or intercounty portion of the federal aid highway system consisting of at least four-sevenths thereof.

Ten per cent fund—Items for engineering, inspection, and unforeseen contingencies not exceeding 10 per cent of the total estimated cost of the construction.

Regulation 2—Application of Regulations

SECTION 1. These regulations apply to all provisions of the act, except the provisions thereof relative to forest roads and trails, unless hereafter so made applicable by order of the secretary.

SEC. 2. These regulations shall apply as fully where the extent to which the state may engage in road construction and maintenance work, or raise state revenues therefor, is limited by its existing constitution and laws as in any other case.

Regulation 3—Information for the Secretary

SECTION 1. Before any agreement is made upon any road or roads to be constructed in a state, or as to the character and method of construction, there shall be furnished to the secretary upon his request, by or on behalf of the state, general information as to its laws affecting roads and the authority of the state and local officials in reference to the construction and maintenance of roads; as to the state highway department, how equipped and organized; as to the existing provisions of its constitution or laws relative to the state revenues for the construction, reconstruction, or maintenance of roads; as to funds that will be available to meet the state's share of the cost of the construction work to be performed and the general source of such funds; and as to provisions made, or to be made, for maintaining roads upon which federal aid funds will be expended.

SEC. 2. Information requested by the secretary or his authorized representatives relating to the maintenance of roads constructed under the provisions of the act shall be furnished from time to time by the state highway departments on forms supplied by the bureau of public roads.

SEC. 3. Data furnished by or on behalf of a state shall be supplemented by such reports of the bureau of public roads as the secretary may from time to time require.

Regulation 4—Federal Aid Highway System Map

SECTION 1. Each state highway department shall file with the secretary of agriculture a state map showing the proposed federal aid highway system and indicating the primary and secondary portion thereof in such form and with such information as he may require.

SEC. 2. The secretary, through his authorized representatives, will make an examination of the proposed system and will from time to time notify the state highway department of the acceptability of the parts of the system examined.

SEC. 3. When agreement has been reached between the state highway department and the secretary as to the whole (or if the state so desires, of a material portion) of the federal aid highway system, the state shall make formal request for the approval of the secretary of agriculture. This request will be accompanied by a state map showing the full proposed federal aid highway system with the primary and secondary highways upon which formal approval is requested, in such form and with such information as may be prescribed by the secretary or his authorized representatives.

SEC. 4. Pending the formal approval of the state highway system in whole or in part by the secretary of agriculture, only such projects will be approved as are on routes indicated on the proposed federal aid highway system as submitted under section 1 and tentatively accepted by the secretary under section 2 of this regulation: *Provided*, That the secretary of agriculture may approve project statements submitted by the state highway departments prior to the selection, designation, and approval of the system of federal aid highways herein provided for if he may reasonably anticipate that the projects will become a part of such system.

Regulation 5—Project Statements

SECTION 1. A project statement may be submitted for the whole or any part of a continuous route or routes embraced in the federal aid highway system selected or designated in accordance with the provisions of the act, preference being given to such projects as will expedite the completion of a system of highways interstate in character.

SEC. 2. Prior to the selection, designation, and approval of the federal aid highway system, project statements may be submitted for any route or part of a route if the secretary may reasonably anticipate that such route will become a part of such system. After the federal aid highway system shall have been selected, designated, and approved no project statements shall be submitted for any route or part of a route not embraced in the system so selected, designated, and approved.

SEC. 3. A project statement shall contain such information as the secretary may require to be submitted on a form supplied by the bureau of public roads and shall be accompanied by a sketch map in sufficient detail and covering such length of road as may be necessary to determine the fitness of the location as a part of the federal aid highway system and with the termini of the proposed improvement indicated thereon.

Regulation 6—Surveys, Plans, Specifications, and Estimates

SECTION 1. The surveys, plans, specifications, and estimates shall show in convenient form and detail the work to be performed and the probable cost thereof, all in conformity with the standards, governing form, and arrangement prescribed by the secretary.

SEC. 2. Copies of the specifications shall be submitted with the plans and estimates, except that where standard specifications have been approved by the chief of the bureau of public roads a statement to the effect that approved standard specifications govern may be submitted in lieu of the printed documents.

SEC. 3. Until plans, specifications, and estimates for a project or part thereof have been submitted and found satisfactory for recommendation, and the state has been so notified by the district engineer of the bureau of public roads, no project or part thereof shall be let to contract.

SEC. 4. The estimate for each project shall show the estimated quantity and the estimated cost of each item of construction in detail and, separately, the 10 per cent fund, and shall not include any expense for advertising.

SEC. 5. Unless state standard contract and bond forms have been approved, there shall be submitted with each set of plans for the approval of the secretary copies of the form of contract, together with all documents referred to therein or made a part hereof, and of the contractor's bond which it is proposed to use on the project. No alteration of either of these forms, when once approved, shall be made until it is approved by the secretary.

SEC. 6. Where any part of the cost of a project is to be furnished by a county or other local subdivision or subdivisions of a state, the plans, specifications, and estimates shall be accompanied by certified copy of each resolution or order, if any, of the appropriate local officials, or such other showing as the secretary may require respecting the funds which are made available, or respecting the supervision of the construction of the road and of the control of the money provided for paying such cost.

SEC. 7. Right of way ample for any project shall be provided and no incidental damages to adjoining property, due to construction work paid for by or on behalf of the state, shall be included in the estimate or be paid in any part, directly or indirectly, by the federal government.

SEC. 8. Grade crossings occurring on the federal aid highway system shall be classified for priority of improvement by agreement between the state highway departments and the bureau of public roads.

SEC. 9. No part of the expense of making surveys, plans, specifications, or estimates, by or on behalf of the state prior to the beginning of construction work, shall be included in the estimate or paid by the federal government.

SEC. 10. Subsequent to the execution of the agreement no change which will increase the cost of a project to the federal government shall be made, except upon approval by the secretary of agriculture, and no changes shall be made in the termini or type, except upon approval of the chief of the bureau of public roads, but minor alterations which do not affect the general nature of the improvement or increase the total cost to the federal government may be authorized by the chief of the bureau of public roads or his authorized representative.

Regulation 7—Project Agreements

SECTION 1. A project agreement between the state highway department and the secretary shall be executed in triplicate on a form furnished by the secretary. No payment shall be made by the United States unless or until such agreement has been executed, nor on account of work done prior to recommendation by the district engineer of the bureau of public roads that the plans, specifications, and estimates be approved.

Regulation 8—Contracts

SECTION 1. No part of the federal money set aside on account of any project shall be paid until it has been shown to the satisfaction of the secretary that adequate methods, either advertising or other devices appropriate for the purpose, were employed, prior to the beginning of construction, to insure economy and efficiency in the expenditure of such money.

SEC. 2. Upon publication of advertisements copies thereof shall be furnished to the bureau of public roads.

SEC. 3. Bids shall conform to the standard proposal form, and the items shall be the same as those contained in the estimate provided for in regulation 6, section 4.

SEC. 4. Copy of the tabulated bid prices, showing the unit prices and the totals of each bid for every project, shall be furnished promptly to the bureau of public roads.

SEC. 5. In advance of the acceptance of any bid sufficient notice of the time and place the contract is to be awarded shall be given to the bureau of public roads to enable it, if it so

desires, to have a representative present. When a bid has been accepted prompt notice thereof shall be given to the bureau of public roads.

SEC. 6. If the contract be awarded to any other than the lowest responsible bidder, the federal government shall not pay more than its pro rata share of the lowest responsible bid, unless it be satisfactorily shown that it was advantageous to the work to accept the higher bid.

SEC. 7. The specifications and plans shall be made a part of the contract.

SEC. 8. A copy of each contract, as executed, shall be promptly certified by the state highway department and furnished to the secretary, and no alteration in the contract shall be subsequently made without the approval of the secretary.

Regulation 9—Construction

SECTION 1. Suitable samples of materials to be used in construction work shall be submitted, by or on behalf of the state highway department, to the bureau of public roads whenever requested.

SEC. 2. Unless otherwise stipulated in writing by the secretary or his authorized representative, materials for the construction of any project shall be tested, prior to use, for conformity with specifications, according to methods prescribed or approved by the bureau of public roads.

SEC. 3. No part of the money apportioned under the act shall be used, directly or indirectly, to pay or to reimburse a state, county, or local subdivision for the payment of any premium or royalty on any patented or proprietary material, specification, process, or type of construction unless purchased or obtained on open actual competitive bidding at the same or a less cost than unpatented articles or methods, if any, equally suitable for the same purpose.

SEC. 4. The supervision of each project by the state highway department shall include adequate and continuous engineering inspection throughout the course of construction.

SEC. 5. Written notice of commencement and completion of work on any project shall be given promptly by the state highway department to the bureau of public roads.

SEC. 6. Reports of the progress of construction, showing force employed and work done, shall be furnished as requested by the secretary or his authorized representatives.

Regulation 10—Records and Cost Keeping

SECTION 1. Such records of the cost of construction, of inspection, of tests, and of maintenance, done by or on behalf of the state, shall be kept, by or under the direction of the state highway department, as will enable the state to report, upon the request of the secretary or his authorized representatives, the amount and nature of the expenditure for these purposes.

SEC. 2. The accounts and records, together with all supporting documents, shall be open at all times to the inspection of the secretary or his authorized representatives, and copies thereof shall be furnished when requested.

Regulation 11—Payments

SECTION 1. Vouchers, in the form provided by the secretary and certified as therein prescribed, showing amounts expended on any project and the amount claimed to be due from the federal government on account thereof, shall be submitted by the state highway department to the bureau of public roads, either after completion of construction of the project, or if the secretary has determined to make payments as the construction progresses, at intervals of not less than one month.

Regulation 12—Submission of Documents

SECTION 1. Papers and documents required by the act or these regulations to be submitted to the secretary may be delivered to the chief of the bureau of public roads or his authorized representatives and, from the date of such delivery, shall be deemed submitted.

RULES AND REGULATIONS FOR ADMINISTERING FOREST ROADS AND TRAILS

(Approved by the secretary of agriculture, March 11, 1922.)

Basis

That portion of section 2 of the federal highway act approved November 9, 1921, which defines the term "forest roads," all of section 23 of the said act, and such other portions of the act as apply to forest roads.

Regulation 1—Definitions

For the purpose of these regulations the following terms shall be construed, respectively, to mean:

SECTION 1. *Secretary*—The secretary of agriculture of the United States.

SEC. 2. *Bureau*—Bureau of public roads of the department of agriculture.

SEC. 3. *State*—Any state, territory, or insular possession.

SEC. 4. *State highway department*—As defined in the act.

SEC. 5. *County authorities*—The commissioners, supervisors, or officials in charge of the selection of roads in a county, road district, or town, and the expenditure of county funds for road building and maintenance.

SEC. 6. *Forest roads*—Roads wholly or partly within or adjacent to and serving the national forests.

SEC. 7. *Forest highway fund*—The appropriation made by the act for forest roads of primary importance to the state, counties, or communities within, adjoining, or adjacent to the national forests, to be known as forest highways.

SEC. 8. *Forest development fund*—The appropriation made by the act for roads and trails of primary importance for the protection, administration, and utilization of the national forests or when necessary for the use and development of the re-

sources upon which communities within or adjacent to the national forests are dependent, to be known as forest development roads.

SEC. 9. *Construction*—Reconstruction and improvement of roads as well as original construction.

SEC. 10. *Maintenance*—The making of necessary repairs and the preservation of a reasonably smooth surface, considering the type of road, but not extraordinary repairs or reconstruction.

SEC. 11. *Major project*—A road whose survey and construction shall be prosecuted under the supervision of the bureau. This term includes all road projects on the forest highway system except those—

(1) Which do not require the technical services of a highway engineering organization;

(2) Whose estimated average cost is less than \$2,000 per mile.

The term includes forest development roads whose estimated average cost exceeds \$5,000 per mile, or which require the technical services of a highway engineering organization.

SEC. 12. *Minor project*—A road whose survey and construction shall be prosecuted under the supervision of the forest service. This term includes all trails and all roads not comprised within the definition of major project.

Regulation 2—Apportionment

SECTION 1. From such information, investigation and sources as the forester shall deem most accurate he shall prepare a tabulation showing the areas and value of the national forest land in each state, including the value of forage and timber. This tabulation, if approved by the secretary, shall serve as the basis of apportionment for the forest highway fund.

SEC. 2. The secretary, after considering the recommendations of the forester, will apportion the forest highway fund for expenditure within the state as follows: One-half in the

ratio that the area of national forest land in any state bears to the total area of such land in all states and one-half in the ratio that the value of national forest land in any state bears to the total value of such land in all states.

SEC. 3. The forester shall prepare a tabulation for the distribution of the forest development fund for expenditure within the states based on the relative needs of the various national forests, taking into consideration the existing transportation facilities, the value of timber or other resources served, relative fire danger, and comparative difficulties of road and trail construction. This tabulation, if approved by the secretary, shall constitute the apportionment of this fund for expenditure within the states.

SEC. 4. Ten per cent of the amount apportioned for expenditure within each state from the forest highway fund shall be set aside for allotment for administrative expenses of the bureau and the forest service and for the purchase and maintenance of equipment. The portion of the amounts set aside not required for these purposes will be returned to funds for construction purposes.

SEC. 5. After deduction of the amounts set aside for administration and equipment expenses, the forest highway fund apportioned to the several states shall be available for expenditure on the survey, construction and maintenance of approved projects on the forest highway system.

SEC. 6. The apportionment for expenditure in each state from the forest development fund shall be available for administrative and equipment expenses of both bureaus, for the construction of major projects recommended by the forester and approved by the secretary, and for minor project work as approved by the forester.

Regulation 3—Selection of Forest Highway and Forest Development Road Systems

SECTION 1. Forest roads shall be classified as follows:

- (1) Forest highways, comprising the forest highway system.

(2) Forest development roads, comprising the forest development road system.

SEC. 2. Forest highways will include:

(1) All existing and proposed roads, or parts of roads, which are necessary sections or extensions of the federal aid system wholly within the national forests.

(2) Other existing and proposed roads, or parts of roads, which are sections or extensions of the federal aid system and partly within or adjacent to and serving the national forests and which may be designated as forest roads by the forester and the chief of the bureau.

(3) Other existing or proposed forest roads of primary importance to counties or communities.

SEC. 3. Forest development roads shall include all other existing or proposed roads within or adjacent to and serving the national forests and designated as forest roads by the forester. A record of all roads designated as forest development roads will be furnished to the bureau.

SEC. 4. The bureau, acting for the secretary, shall request each state highway department to submit a map of the roads within and adjacent to the national forests which in its judgment should be included in the forest highway system, of primary importance to the state, or to the counties, or communities thereof. Each state highway department shall be requested, before submitting such a plan, to secure and consider recommendations from the proper county road officials as to forest highways of primary importance to the counties and communities. The district engineers of the bureau will file together with their recommendations copies of the map with the district forester.

SEC. 5. Each district forester of the forest service shall prepare for the national forests in each state or portion of state within his district maps showing the existing and proposed roads within, adjoining, and adjacent to the forests classified as to status, type, and function. This plan shall be based upon the primary road system proposed by the state highway department. It shall show in which of the following classes, in the judgment of the district forester, each proposed forest road should be included:

(1) Forest highway system, classified as in section 2, regulation 3.

(2) Forest development road system.

Trails, maintenance work, and minor repairs and construction estimated to cost less than \$500 per mile will not be included on such maps.

The plan shall be revised annually in accordance with the above procedure.

SEC. 6. The bureau, acting for the secretary, shall arrange a conference with the state highway department and the forest service for consideration of the forest highway system proposed by the state highway department and the district forester. Following such conference final recommendations for the designation of a forest highway system shall be submitted to the secretary by the chief of the bureau and the forester.

SEC. 7. The forest highway system may be added to or revised by the action of both bureaus, following the procedure herein provided for the original designation of the system.

SEC. 8. The forest development road system shall be added to or revised as the forester shall prescribe.

Regulation 4—Selection of Forest Highway and Forest Development Programs

SECTION 1. The chief of the bureau and the forester shall, following the recommendations from their district representatives, prepare and submit to the secretary a list of the forest highway projects selected for the initial (fiscal years 1922 and 1923) forest highway program. The program shall include provision for the maintenance of roads existing or under construction. This list shall set forth the location, available cooperation, if any, whether major or minor, and the tentative expenditure authorized from the forest highway and other available forest-road funds. Upon the approval of such projects, or any of them, by the secretary, they shall be included in the forest highway program.

SEC. 2. Subsequent projects to be incorporated in the forest highway program shall be selected as follows: All projects proposed by counties, communities, or other agencies shall be submitted to the state highway department. The bureau, acting for the secretary, shall request each state highway department to submit a list of proposed projects, including its recommendations on all projects submitted to it by counties or other agencies. All projects shall be submitted as far as practicable on forms furnished by the secretary.

SEC. 3. The recommendations of the bureau on all projects received from the state highway department shall be furnished to the district forester and the state highway department. The district forester shall investigate any proposed projects coming within the requirements of the forest highway fund, including those submitted by county authorities, communities, or other agencies to the state highway department. The district forester shall call upon the district engineer of the bureau for any necessary engineering investigations to supply accurate and full information with reference to proposed state or county projects. The district engineer shall arrange for joint conferences with the state highway department and the district forester for final consideration of the program. A joint report shall be filed with the forester and the chief of the bureau, together with such additional recommendations as their respective representatives may wish to make, following which the forester and the chief of the bureau will submit a program of recommended forest-highway projects to the secretary for approval, classified as major and minor. The forest highway program may be added to and modified from time to time, following the same procedure. The program shall include provision for the maintenance of roads existing or under construction.

SEC. 4. The selection of forest highways for improvement or construction shall include only those which qualify under section 2, regulation 3.

SEC. 5. The forest highway program shall be based upon the following considerations:

(1) Construction correlation with adjacent federal and state road programs.

(2) The interests of communities within, adjoining, or adjacent to the national forests.

(3) Service to the national forests by increasing their value and usefulness.

(4) The economy of continuity of operations.

(5) Benefit to forest development, protection, and administration.

(6) Amount of available cooperative funds.

SEC. 6. The district forester shall prepare and submit for approval by the forester and secretary a list of forest-development roads which constitute major projects. This list shall set forth location, available cooperation if any, and authorized expenditure from the forest development or other available funds. Upon the approval of such projects, or any of them, by the secretary, they shall be included in the forest development program. The selection of forest development roads and trails constituting minor projects shall rest with the forester.

Regulation 5—Cooperative Agreements

SECTION 1. Cooperation from the state highway department, county authorities, or other agencies, associations, or individuals shall not be required but may be accepted.

Cooperative agreements shall be entered into for all projects which involve financial contributions to surveys, construction, or maintenance by the state highway departments or county authorities, and shall be approved prior to beginning survey or construction as the case may be.

SEC. 2. Negotiations for cooperative agreements for approved forest highway projects of the first two classes under section 2, regulation 3, shall be conducted by the bureau, following an agreement with the forest service as to financial cooperation, if any, and maintenance. The detailed provisions of the agreements shall be those agreed upon by the bureau and the state highway department. All agreements for con-

struction shall be based upon location survey estimates and shall be prepared on forms furnished by the secretary for execution by the secretary and the state highway department.

SEC. 3. Negotiations for cooperative agreements for other forest road projects shall be conducted by the forest service, after consultation with the bureau as to their technical and financial features. The detailed provisions of the agreement shall be those agreed upon by the forest service and the cooperating agency. All such agreements for the construction of major projects shall be based upon survey estimates prepared by the bureau and shall be prepared for execution by the secretary and the cooperating agency. Agreements for minor projects shall be executed by the forester or district forester of the forest service and the cooperating agency.

Regulation 6—Surveys, Construction, and Maintenance

SECTION 1. The survey and construction of minor projects included in the forest highway and forest development programs shall proceed under the direction of the forest service. On roads that may ultimately be improved to constitute part of an important public highway, a reconnaissance survey shall be made by the bureau, and all construction shall follow the location so determined as closely as practicable.

SEC. 2. A location survey and estimate of cost of major projects included in the forest highway and forest development programs, under allotments set up as provided in regulation 7, shall be made by the bureau as soon as practicable.

SEC. 3. Construction work on any major project included in the forest highway or forest development program shall not be authorized or undertaken until a location survey and cost estimate satisfactory to the bureau has been made by the bureau, unless specifically agreed upon by the forester and the chief of the bureau.

SEC. 4. Upon the completion of such survey and cost estimate, the construction of a designated project, conforming with the original project or forming a part thereof, at a designated cost not exceeding by more than 25 per cent the

expenditure authorized in the forest highway or forest development program, may be authorized by joint agreement of the chief of the bureau and the forester. Construction projects substantially deviating from the project as approved in the forest highway or forest development programs or which exceed by more than 25 per cent the expenditure authorized therein shall be submitted by the chief of the bureau and the forester to the secretary for approval.

SEC. 5. Following the authorization of any major construction project as provided in this regulation, the bureau shall proceed with its construction under an allotment set up as provided in regulation 7.

SEC. 6. The construction of projects on all national forest highways of classes 1 and 2 of regulation 3, section 2, shall be in accordance with plans and specifications prepared under the direction of the bureau. Such construction shall not be started until the plans and specifications have been approved by the bureau and by the state highway department, and until the district forester has had opportunity to examine the location map or surveyed line and to indicate any details of location desirable for the protection or development of the national forests.

The construction of all other major projects under the direction of the bureau shall be in accordance with the plans and specifications prepared by the bureau and approved by the forest service and each cooperating agency.

SEC. 7. The construction of minor projects shall be in accordance with the specifications approved by the forest service and such cooperating agency as may be involved.

SEC. 8. Construction work on national forest highways of classes 1 and 2 of regulation 3, section 2, shall not be considered complete until the project has been inspected and approved by the bureau and the state highway department, nor until the district forester has approved the clearing and disposal of refuse. No other construction work on major projects shall be accepted as complete by the bureau until it has been inspected and approved by the district forester and the cooperator.

SEC. 9. Maintenance work on all forest highways shall be performed by the bureau unless otherwise specified by agreement. The maintenance of all other road and trail projects shall be performed by the forest service unless otherwise provided by cooperative agreement.

Regulation 7—Records and Accounting

SECTION 1. Following the approval of the initial forest highway program for any state and of any subsequent projects or group of projects included therein, a lump sum allotment shall be set up by the forest service with the district fiscal agent of the forest service for disbursement on vouchers approved by authorized officers of the bureau covering:

(1) The authorized expenditures of all approved major projects.

(2) The current cost of maintenance on all projects to be maintained by the bureau, as estimated by the bureau.

(3)* From the administrative and equipment fund provided for by regulation 2, section 4, an amount for administrative expenses and equipment equal to 10 per cent of the sum of Nos. 1 and 2.

Such allotments shall be drawn from any available road appropriation applicable under existing law and regulation of the secretary to the projects concerned. Upon agreement between the chief of bureau and the forester to authorize construction of a project, as provided in section 4 of regulation 6, necessary additions to or deductions from the allotment previously set up shall be made. The bureau is authorized to make transfers between construction project allotments not exceeding 10 per cent of any allotment so reduced or increased. Transfers of more than 10 per cent may be made with the concurrence of the forest service. Any unused balances under such allotment shall be made available for subsequent program work.

SEC. 2. Following the approval of the forest development road program for any state or subsequent development projects in that state, a similar allotment covering major projects so

approved shall be set up for disbursement on vouchers approved by the bureau, and a similar procedure followed in subsequent adjustments or transfers.

SEC. 3.* Corresponding allotments shall be set up by the forest service with the district fiscal agents of the service covering approved minor projects and the expenditures of the forest service for administration and maintenance. One per cent of each forest highway apportionment shall be similarly set up for administrative expenses of the forest service.

SEC. 4. The forester shall be responsible for maintaining an accurate fiscal record of the status of all appropriations for national forest roads and all expenditures and allotments thereunder for administration, equipment, surveys, construction, and maintenance.

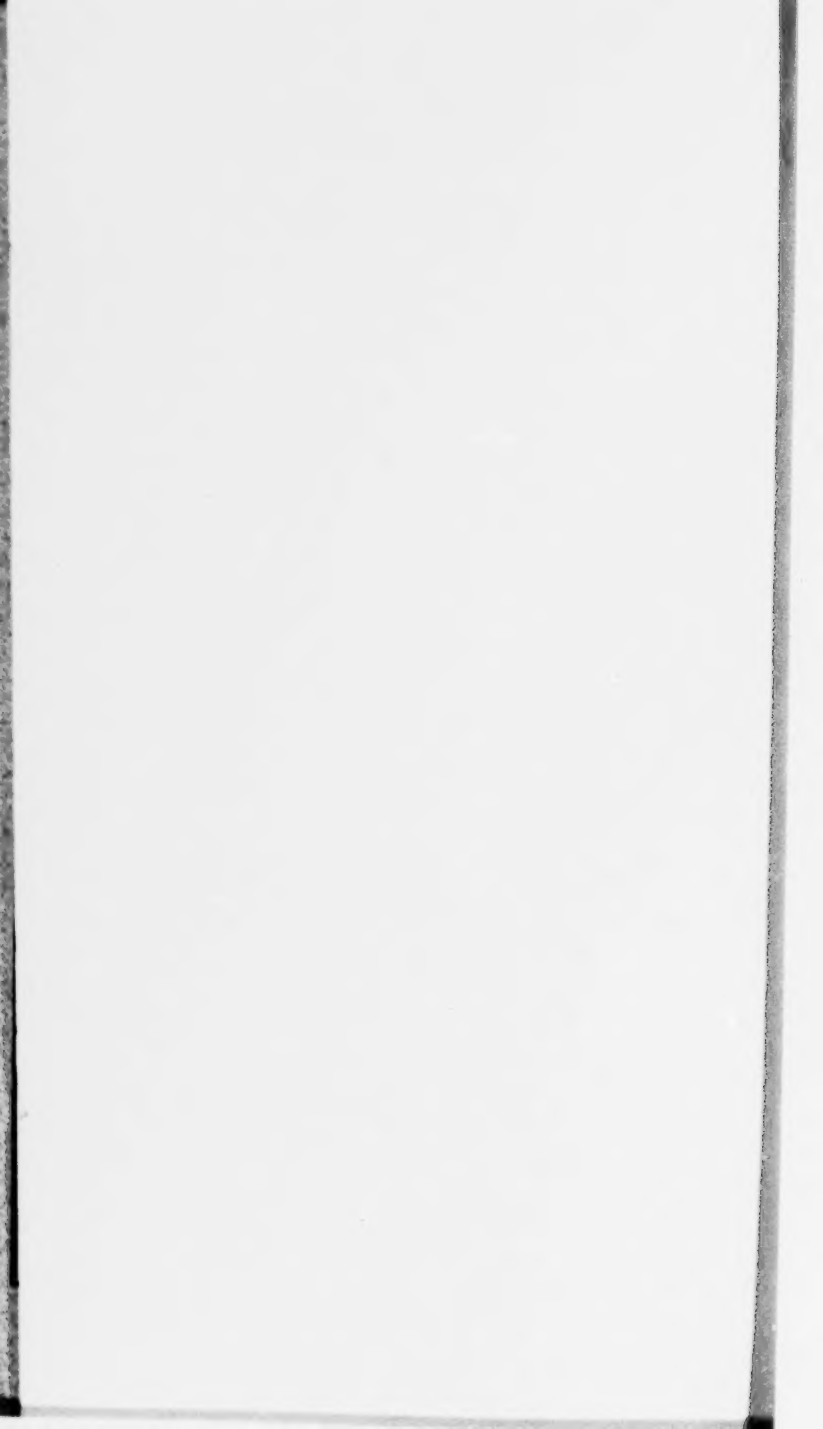
SEC. 5. As soon as practicable after the end of each fiscal year the forest service shall prepare a report to the secretary showing the work accomplished in each state on forest development roads and the disbursements made therefor. For the purpose of this report the bureau shall furnish to the forest service information regarding the work accomplished on any forest development roads under the direction of the bureau. The bureau shall also furnish to the forest service a copy of each monthly statement exhibiting the progress of all its construction and the financial status of each project.

As soon as practicable after the end of each fiscal year the bureau shall also report to the secretary the work done on national forest highways in each state and the disbursements made therefor.

SEC. 6. Cooperative funds deposited in the United States treasury shall be placed in the appropriation "cooperative work, forest service," authorized by act of congress of June 30, 1914 (38 Stat. 415, 430), and shall be audited, disbursed, and recorded in the same manner as funds under the act. Cooperative funds not deposited in the treasury shall be audited and disbursed as provided in the cooperative agreement.

* As amended April 1, 1923.

SEC. 7. The bureau shall keep all records which it deems necessary of survey, construction, and maintenance costs on major projects supervised by it. The bureau shall furnish the forest service with a final report showing the accomplishments and expenditures on each project constructed by it, and on the projects constructed under a cooperative agreement a copy of the report will be furnished by the bureau to the cooperating agency.



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DEC 28 1926

**In the Supreme Court
of the United States**

OCTOBER TERM, 1926

No. 372

**R. B. MORRIS, doing business as MORRIS & LOWTHER;
H. M. HEWITT and LEW NUNAMAKER, doing business
as JOHN DAY VALLEY FREIGHT LINE; H. L. LIV-
INGSTON, doing business as BEND-PORTLAND TRAN-
SIT, and PORTLAND-HOOD RIVER TRUCK LINE, INC.,**
Appellants,

vs.

**WM. DUBY, H. B. VAN DUZER, and W. H. MALONE, as
the OREGON STATE HIGHWAY COMMISSION,**
Appellees.

*Appeal from the District Court of the United States from the
District of Oregon.*

**Reply to Motion to Vacate Decree
and Brief in Support**

L. H. VAN WINKLE,
Attorney-General for the State of Oregon,
J. M. DEVER,

Assistant Attorney-General for the State of Oregon,
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**W. E. CRAWFORD,
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Reply to Motion to Vacate Decree and Brief in Support

*To the Honorable, the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

Come now the appellees above named, and for their answer and reply to the motion for a vacation of the decree of the court heretofore made and entered, represent and urge the following facts:

The motion presented at this time by the appellants is directed against the judgment and decree of this court made and entered on the 29th day of October, 1926, by which decree the court vacated the decree of the District court of the United States for the District of Oregon,

and remanded the cause to the lower court with directions to dismiss the bill of complaint on the ground that the case had become a moot case, and the decree of this court provided that the appellants might within thirty days move for a vacation of the decree if they questioned the rescission of the order of the Highway Commission.

The record leading up to the decree of this court, the vacation of which is now moved by the appellants, briefly stated is as follows:

The State of Oregon as a part of its program of highway legislation enacted chapter 371 of the General Laws of Oregon, 1921, which act is known as "The Motor Vehicle Law." To sections 35 and 36 of that motor vehicle law the Highway Commission of Oregon points for its authority to make the order challenged by the appellants. Those sections read as follows:

"Highway Commission and County Court May Grant Special Permits.—Upon receipt of an application for permission to move over any highways of this state, any vehicle, article, property or thing having a combined weight in excess of twenty-two thousand (22,000) pounds, the State Highway Commission, or the county court, to whom such application may be made shall investigate the representations made in said application and, if in the judgment of said State Highway Commission, or of such county court the interests of the public will be served by the proposed movement, the State Highway Commission, or such county court may grant written permission for such movement which shall include such terms, rules, stipulations and conditions as said commission or said court may deem to be necessary or desirable for the protection of the highways and of the public interest; provided, however, that in every such case the said State Highway Commission or the county court shall require the applicant for such permit to furnish a good and sufficient bond of indemnity for any damage to the highways that may be caused by such movement. Said bond shall be in such amount as the State Highway Commission or the county

court may deem necessary for the full protection of the public interest and shall be filed with the commission or court granting the authority or permission, as the case may be. No movement of any such vehicle, device or thing shall begin until said permission has been granted and the required bond has been filed and accepted by the highway commission or the county court.

"The highway commission or the county court may, in its discretion, appoint one of its officers or agents to be present at and during the movement, but the presence of such officer or agent, or any interference or suggestions offered or made by such agent, shall not be deemed to be supervision of the movement, or in any manner to relieve the party to whom such permit has been granted, or the sureties on said bond, from sole responsibility for every damage that may be done by such movement; provided, however, that if in the opinion of said officer or agent of said highway commission or county court the terms, rules, stipulations and conditions of the permit granted for such movement are not being complied with, such agent may [be], and he is hereby authorized to order such movement to be forthwith stopped.

"Section 36. *State Highway Commission and County Courts May Limit Weights and Speeds and Close Highways.*—Whenever in the judgment of the State Highway Commission or of any county court or board of county commissioners of any county of this state it would be for the best interests of the state or county and for the protection from undue damage of any highway or highways, or of any section or sections thereof, and with respect to such highways or any sections thereof, to reduce the maximum weights and speeds in this act provided for vehicles moving over or upon the highways of this state; or if in the judgment of the State Highway Commission or of any county court or board of county commissioners of any county of this state it would be for the best interests of the state or of the county and for the protection from undue damage of any highway or highways or of any sections thereof, to close such highway or highways or any sections thereof, for any or all traffic or for any particular class of traffic or for the moving thereon of any kind, size or weight of vehicles or any kind of com-

modity, freight or thing, then, in that event, the highway commission or the county court or board of county commissioners of any county may, and is hereby authorized and empowered to, determine and fix the reduced weights and speeds which shall be the maximum weights and speeds for vehicles or things moving over such highway or highways or any specified sections thereof, and/or to prohibit the use of such highway or highways or any section or sections thereof for moving thereon any kind, size or weight of vehicle or any kind of commodity, freight or thing, for such period or periods of time as in the judgment of said commission or county court or board of county commissioners, will be for the best interests of the state or county.

"The State Highway Commission, or the county court or board of county commissioners, as the case may be, shall post a notice in a conspicuous manner and place, so it can be readily seen and read, at each end of any highway or section thereof, for which limitations of traffic as in this section provided have been determined and fixed by said commission or court. Such notice shall state plainly the limitations or prohibitions of traffic determined and fixed by said commission or court in respect to such highway or section thereof." (Chapter 371, G. L. O. 1921, 732, 733.)

Pursuant to the authority vested in the commission by virtue of said law, the highway commission on the 28th day of September, 1925, made and entered an order, a copy of which is marked "Exhibit A" and is hereto attached and made a part of this answer. By that order the commission for the purpose of preserving the roads against damage being done during the rainy season by heavy traffic, reduced the maximum weight of truck and load from 22,000 pounds to 16,500 pounds.

The appellants challenged by a bill of complaint filed in the United States District Court for the District of Oregon the authority of the Oregon Highway Commission to

make such order, and they likewise challenged the constitutionality of the Oregon statute which authorized and permitted the making of the order.

The appellants sought and prayed for not only a permanent injunction against the enforcement of the order, but a temporary restraining order restraining the highway commission from putting into effect the said order, and in their prayer they petitioned as follows:

"The plaintiffs pray that a temporary injunction be granted, restraining the defendants and all (fol. 16) other officers and agents of the State of Oregon, from arresting or threatening to arrest or otherwise preventing, hindering or obstructing the said plaintiffs and all other members of the said Auto Freight Transportation Association of Oregon and Washington, while engaged in operating motor trucks over said portion of the said Columbia River Highway from the East County line of Multnomah County to Hood River, upon the ground and for the reason that the said plaintiffs, as well as other members of the Auto Freight Transportation Association of Oregon and Washington, are operating their said motor trucks when the gross weight thereof exceed 16,500 pounds, but not to exceed the gross weight of 22,000 pounds; that as the constitutionality of a State Statute and the enforcement thereof by the defendants is sought to be enjoined, the plaintiffs pray that the court proceed to call in two other judges of this court one of whom to be a circuit judge, for the purpose of hearing and determining the application of the temporary injunction as prayed for herein; and that upon the final hearing of this suit, the said order of said defendants issued on August 28, 1925, limiting the gross weight of motor trucks on that portion of said Columbia River Highway, from the east county line of Multnomah county to Hood River, to 16,500 pounds, as well as the provisions of said law of Oregon of 1921, relating to the powers and authority of the State Highway Commission to limit the gross weight of motor vehicles, including their load, below 22,000 pounds, be declared void and unconstitutional and such interlocutory injunction be made permanent, and

plaintiffs pray for such other, further and proper relief as may be just and equitable in the premises, including their costs and disbursements expended herein." (Transcript of Record, pp.14, 15.)

The application for a temporary restraining order was heard by a three-judge court under the provisions of section 266, as amended by the Judicial Code, which application was denied.

An amended bill of complaint was filed and a second application made for a temporary restraining order, and again a three-judge court denied the application.

The appellants refused to further plead, and their complaint and cause were dismissed.

From such order the appellants appealed direct to this court.

Counsel for appellants gave notice that on the 24th day of May, 1926, they would submit to this court a petition for a stay, or in the alternative for the advancement of the case. The said application was typewritten, and in that respect did not comply with the rule of the court.

To this application for a stay the appellees made reply, and among other matters set out in said reply the appellees on page 18 thereof said:

"These appellees further answering the application for a stay, allege that the order made by the State Highway Commission was made for the purpose of protecting the public highways against the damage which was being done by the appellants and others similarly engaged, and was directed not only at the appellants, but, as is disclosed from the order itself, was directed to the public at large; that said order was temporary and was made for the purpose of protecting the highway during the rainy season; that the court in its order denying the application for a temporary restraining order, noted and directed attention to the fact that said order was temporary and not perma-

nent, and as further evidence of that fact it is alleged that the appellees herein named, at their regular meeting held in Portland, Oregon, on March 25, 1926, by an order entered in its minutes, revoked the order challenged by these appellants and by which the maximum load limit was reduced upon the section of the Columbia River Highway now in dispute, and said order is not now and has not been since April 1, 1926, in effect; that the order of the commission revoking its previous order reducing the load limit on said highway is entered at page 1977 of volume 10 of the records and minutes of the Oregon State Highway Commission, and reads as follows: 'On motion which was carried, the commission authorizes the removal of load limitations on the following highways, effective April 1, 1926: Columbia River Highway between Multnomah county line and Hood River.' Then follows a list of the other highways affected by the orders of the commission by which maximum load limits were reduced. It is manifest, therefore, that appellants are seeking a stay of an order not now in effect." (Answer to Petition for Stay, p. 18.)

It was urged in the reply, and is true that the original order by the Oregon Highway Commission was made to protect the roads during the rainy season, and it was so held by the court below. On this point the court below said:

"There is no constitutional or legal reason why the state legislature might not at the time have made the maximum truckload less than 22,000 pounds, so that it did not make it so low as practically to rule trucks off the highway, which would raise a legislative question involving discretion touching the reasonableness of the provision of the act.

"The legislature having this power, it also had the power to delegate to the State Highway Commission the authority in cases of emergency to reduce the carrying weight of trucks until the emergency was relieved against. This is all the commission attempted and is attempting to do in the present case. The order of the commission is temporary, not permanent, it reading 'until revoked or modified.'" (Trans. of Record, p. 822.)

In so far as we are advised the application for a stay was never acted upon by this court, but instead the cause was set down for argument on the merits on October 25, 1926, and came on for argument on October 29th of said year.

Appellants did not make oral argument but submitted their cause on written brief.

The appellees appeared for oral argument by J. M. Devers, Assistant Attorney General for the State of Oregon.

During the discussion there was developed the fact that the order of the Oregon Highway Commission, which order was the occasion for the present law suit, had been on the 25th day of March, 1926, revoked. It was also developed that a similar order would be put into effect by the Oregon Highway Commission in the early part of November and would remain effective during the fall and winter rains for the purpose of protecting the public highways from the results of heavy traffic.

This court reached the conclusion that as a result of the vacation of the order of the highway commission made September 28, 1925, which order was the occasion of this law suit, was to reduce the controversy to a moot case, and, so holding and ruling, the court vacated the order of the district court and remanded the cause to the court below with instructions to dismiss the bill of complaint.

Appellants now move that the order and decree of this court be vacated. The appellees will welcome a disposition of this entire controversy upon its merits, and desire a declaration of the law covering the field within which State of Oregon may legislate and the extent to which the Oregon Highway Commission pursuant to such legislation may regulate the use of the public highways of the state.

During the oral argument by counsel for appellees it was stated that the occasion of this law suit is the order made by the Oregon State Highway Commission on the 28th of September, 1925, which order was subsequently vacated and revoked, and that statement we believe to be a statement of fact. It is true, however, that appellants have challenged the constitutionality of the Oregon law which sanctioned and permitted the making of the order. But we believe that the Oregon statute was challenged simply as an additional means or an occasion to get before this court. The Oregon law limits the maximum weight of truck and load to 22,000 pounds. Against this limitation there appears to be no complaint from appellants. If the legislature can limit the weight it can delegate that authority to the highway commission. In fact, the Oregon legislature has itself reduced the maximum weight of load and truck below 22,000 pounds, which limitation will become effective January 1, 1927. That limitation as fixed by the Oregon legislature in the following amendment to the law of 1921 is as follows:

"Sec. 33. *Limiting the Combined Weight of Anything Moving Over the Highways of the State.*—No vehicle, motor vehicle, motor truck, device or thing having a combined weight in excess of twenty-two thousand (22,000) pounds at the point of contact [contact] of the four wheels of any such vehicle with the surface of the highway, or a combined weight of more than seventeen thousand six hundred (17,600) pounds at the points of contact of the two wheels of any one axle of any such vehicle, or of a combined weight of more than twenty-two thousand (22,000) pounds if a device not equipped with wheels, shall be moved over or upon any highway of this state without the written permission of the State Highway Commission or of the county court of the county in which such road is located obtained as in this act provided; provided, that in no event shall the combined weight of both vehicle and load on and after January 1, 1927, exceed the total sum of

twenty thousand (20,000) pounds; and provided further, that in no event after said date shall the combined weight of any such vehicle or device be in excess of fourteen thousand four hundred (14,400) pounds at the points of contact of the two wheels of any one axle of any such vehicle, or a combined weight of more than twenty thousand (20,000) pounds if a device not equipped with wheels, without written permission of the State Highway Commission or of the county court of the county in which such road is located. The provisions of this section shall not apply to any vehicle, article, machine or other equipment used by any county in the construction, maintenance or repairs of its public highways, or in the transportation of county equipment. (Chapter 309, Laws of 1925, p. 586.)

It will be noted, therefore, that on and after January 1, 1927, the maximum weight of load and truck during any part of the year shall not exceed 20,000 pounds.

We think that this court should know as a matter of record that there is now in effect an order made by the Oregon Highway Commission reducing the maximum weight of load and truck to 16,500 pounds, which order applies to trucks which are equipped with solid tires, it being the experience and judgment of the commission that the greater damage is done by the vehicle employing solid tires as opposed to the pneumatic tire. A copy of that order, marked "Exhibit B" is hereto attached and made a part of this reply.

Therefore, because of the fact that not only the members of the legislature, but the officers entrusted with the construction, maintenance and preservation of the public highways of the state have found it necessary to regulate the use of the highways, and in connection with such regulation to curtail at times the activities of certain users of the highway, it will, in the judgment and opinion of appellees, be helpful and wholesome if the authority of the state

of Oregon over its public highways can be defined by the Supreme Court of the United States, at least with respect to the challenge now made by appellants.

Wherefore, to the end and purpose that the controversy may be disposed of on its merits, we respectfully submit and urge that the decree heretofore made and entered be vacated, and in its stead a judgment order and decree be entered defining and declaring the law of the case and the power and the authority of the State of Oregon with respect to regulation of its state highways, and thus will public interests and private rights be safeguarded and promoted.

Respectfully submitted:

I. H. VAN WINKLE,

Attorney-General for the State of Oregon.

J. M. DEVERS,

Assistant Attorney-General for the State of Oregon

Attest:

ROY A. KLEIN,

Secretary to Oregon State Highway Commission

EXHIBIT B

OREGON STATE HIGHWAY COMMISSION
ORDER REDUCING MAXIMUM LOAD LIM-
ITS ON CERTAIN STATE HIGHWAYS

Whereas, the following roads or highways have been designate and declared to be and are state highways, and have been improved and are being maintained by the State Highway Commission pursuant to the laws of the State of Oregon as state highways, to wit:

Alsea Highway
Ashland-Klamath Falls Highway
Columbia River Highway
Coos Bay-Roseburg Highway
Corvallis-Newport Highway
McKenzie Highway
McMinnville-Tillamook Highway
Mt. Hood Loop Highway
Redwood Highway
Roosevelt Coast Highway
Santiam Highway
Willamette Highway
Willamette Valley-Florence Highway

And whereas, the said above named state highways and each and all of the same are, in the judgment of the State Highway Commission, being subjected to a kind and character of traffic which is damaging and injuring said highways, and in order to protect said highways against such damage and injury it is deemed and is the judgment of the Highway Commission, and said Commission finds that it will be for the best interests of the said highways and each of them, that the maximum weights permitted and authorized by law be reduced;

And whereas, the State Highway Commission has after due investigation determined and found, and it is the judgment of the Commission, that the maximum weights which shall be permitted upon the said roads or any of them shall be reduced and fixed as in this order provided:

Now, therefore, the premises being in part as above stated, and the State Highway Commission having as a result of due investigation found that the roads above

mentioned and hereinafter designated are being damaged and injured on account of the kind and character of traffic now being named over and upon said roads, and by reason of the fact that vehicles equipped with solid rubber tires carrying maximum loads moved at the maximum speeds specified by the provisions of the laws of the State of Oregon are breaking up, damaging and deteriorating the said roads, and the commission having found upon due investigation that it will be for the best interests of the said state highways and each of them that the maximum total weight of load and vehicle equipped with solid rubber tires which shall be permitted upon any of said roads shall be reduced from 22,000 pounds to 16,500 pounds, and that the maximum allowable load of 600 pounds per inch of tire width for tires having a width in excess of 30 inches shall be reduced to 450 pounds per inch of tire width, and that the maximum allowable load for tires having a width of less than 30 inches shall be reduced from 500 pounds per inch width of tire to 375 pounds per inch width of tire;

It is hereby ordered, that the maximum weight of combined load and vehicle having solid rubber tires of any kind, including cushion types but not pneumatic, which shall be permitted upon any of the within-named roads shall not exceed 16,500 pounds, and that on any such vehicle having a total tire width of less than 30 inches the concentrated weight in pounds bearing on the surface of the highway at contact with the tread of the two wheels of any one axle of such vehicle shall not exceed the product of the sum of the tire widths of the two wheels of such axle, multiplied by 375 pounds; and on any such vehicle having a total tire width of 30 inches and more than 30 inches the concentrated weight in pounds bearing on the surface of the highway at contact with the tread of the two wheels of any one axle of such vehicle shall not exceed the product of the sum of the tire widths of the two wheels of such axle multiplied by 450 pounds.

It is further ordered, that these rules and regulations as made and found by the State Highway Commission under the provisions of Chapter 371 of the Laws of Oregon for 1921, as amended by Chapter 8 of the General Laws

of Oregon, 1921 Special Session, Chapter 145, General Laws of Oregon for 1923, and Chapter 308, General Laws of Oregon for 1925, shall be in full force and effect for the following period, to wit: From the 15th day of October, 1926, to the 15th day of April, 1927, and the said rules, regulations and findings shall govern traffic operations over and upon the following named state highways, to wit:

Alsea Highway between Philomath in Benton county and Waldport in Lincoln county.

Ashland-Klamath Falls Highway between Green Springs Mountain Summit and the Jackson-Klamath County Line in Jackson county.

Columbia River Highway between the Multnomah-Hood River County Line and the west city limits of Hood River in Hood River county.

Coos Bay-Roseburg Highway between the south city limits of Coquille in Coos county and the Pacific Highway Junction in Douglas county, excluding that portion within the city limits of Myrtle Point.

Corvallis-Newport Highway between the city limits of Corvallis in Benton county and the city limits of Newport in Lincoln county, excluding that portion within the city limits of Toledo.

McKenzie Highway between the east city limits of Springfield and Blue River in Lane county.

McMinnville-Tillamook Highway between Hebo in Tillamook county and the junction with the West Side Pacific Highway in Yamhill county, excluding portions within the corporate limits of Sheridan and Willamina.

Mt. Hood Loop Highway between the Multnomah County Line and the Clackamas-Hood River County Line in Clackamas county, excluding the portion within the corporate limits of Sandy.

Redwood Highway between the junction with the Pacific Highway near Grants Pass and the California State Line in Josephine county.

Roosevelt Coast Highway between the south city limits of Seaside in Clatsop county and the north city limits of Newport in Lincoln county, excluding the portions within the corporate limits of Wheeler, Bay City and Tillamook.

Roosevelt Coast Highway between Lakeside and Glasgow and between the south city limits of Coquille and the east city limits of Bandon, in Coos county.

Santiam Highway between the east city limits of Albany and the north city limits of Lebanon, in Linn county.

Willamette Highway between Goshen and Lowell, in Lane county.

Willamette Valley-Florence Highway between Cheshire and Rainrock in Lane county.

And it is further ordered, that a notice be posted in a conspicuous manner and place at each end of each of the above-named highways, and at important crossroads on each of said highways, so that said notice can be readily seen and read, which said notice shall state plainly the limitations and prohibitions of traffic hereby in this order determined and fixed.

And be it further ordered, that a certified copy of this order be furnished to the county clerk of each county in which any of said highways are located, and that a certified copy of said order be furnished the Chief of the Traffic Enforcement Division for his information.

Dated this 28th day of September, 1926.

OREGON STATE HIGHWAY COMMISSION,

By WM. DUBY, Chairman,

H. B. VAN DUZER, Commissioner,

W. H. MALONE, Commissioner.

Attest:

ROY A. KLEIN,

State Highway Engineer and Secretary.

EXHIBIT A

OREGON STATE HIGHWAY COMMISSION

ORDER REDUCING MAXIMUM LOAD LIMITS ON CERTAIN STATE HIGHWAYS

Whereas, the following roads or highways have been designated and declared to be and are state highways, and have been improved and are being maintained by the State Highway Commission pursuant to the laws of the State of Oregon as state highways, to wit:

Alsea Highway
Ashland-Klamath Falls Highway
Coos Bay-Roseburg Highway
Corvallis-Newport Highway
Crater Lake Highway
Klamath Falls-Lakeview Highway
McMinnville-Tillamook Highway
Mt. Hood Loop Highway
Prineville-Lakeview Highway
Redwood Highway
Roosevelt Coast Highway
The Dalles-California Highway
Willamette Highway
Willamette Valley-Florence Highway

And whereas, the said above named state highways and each and all of the same are, in the judgment of the State Highway Commission, being subjected to a kind and character of traffic which is damaging and injuring the said highways, and in order to protect said highways against such damage and injury it is deemed and is the judgment of the Highway Commission, and said Commission finds that it will be for the best interests of the said highways and each of them, that the maximum weights permitted and authorized by law be reduced;

And whereas, the State Highway Commission has after due investigation determined and found, and it is the judgment of the Commission, that the maximum weights which shall be permitted upon the said roads or any of them shall be reduced and fixed as in this order provided:

Now, therefore, the premises being in part as above stated, and the State Highway Commission having as a

result of due investigation found that the roads above mentioned and hereinafter designated are being damaged and injured on account of the kind and character of traffic now being hauled over and upon said roads, and by reason of the fact that loads of the maximum weight moved at the maximum speeds specified by the provisions of the laws of the State of Oregon are breaking up, damaging and deteriorating the said roads, and the Commission having found upon due investigation that it will be for the best interests of the said state highways and each of them that the maximum weight of load which shall be permitted upon any of said roads shall be reduced from 22,000 pounds to 16,500 pounds, and that the maximum weight of 600 pounds for tires having a width in excess of 30 inches shall be reduced to 450 pounds per inch of tire width, and that the maximum allowable load for tires having a width of less than 30 inches shall be reduced from 500 pounds per inch width of tire to 375 pounds per inch width of tire:

It is hereby ordered, that the maximum weight of combined load and vehicle which shall be permitted upon any of the within-named roads shall not exceed 16,500 pounds, and that on any vehicle having a total tire width of less than 30 inches the concentrated weight in pounds bearing on the surface of the highway at contact with the tread of the two wheels of any one axle of such vehicle shall not exceed the product of the sum of the tire widths of the two wheels of such axle multiplied by 375 pounds; and on any vehicle having a total tire width of 30 inches and more than 30 inches the concentrated weight in pounds bearing on the surface of the highway at contact with the tread of the two wheels of any one axle of such vehicle shall not exceed the product of the sum of the tire widths of the two wheels of such axle multiplied by 450 pounds; and on the Coos Bay-Brookburn Highway between Brook Creek and Upper Ten Mile Creek Bridges, and in respect to this section of that highway it is ordered in view of the special conditions that the maximum load limit which is permitted shall be reduced from 22,000 pounds to 11,000 pounds and the maximum allowable load per inch width of tire shall not exceed 300 pounds.

It is further ordered that these rules and regulations be made and found by the State Highway Commission

under the provisions of Chapter 371 of the Laws of Oregon for 1921, as amended by Chapter 8 of the General Laws of Oregon, 1921 Special Session, shall be in full force and effect for the following period, to wit: From the 15th day of October, 1925, to the 15th day of April, 1926, and the said rules, regulations and findings shall govern traffic operations over and upon the following named state highways, to wit:

- Alsea Highway, between Cedar Creek and Yew Creek (Alsea Mountain Section) and between Maltby Creek in Benton county and Waldport in Lincoln county.
- Ashland-Klamath Falls Highway, between the junction of the Pacific Highway in Jackson county and the west city limits of Klamath Falls in Klamath county.
- Coos Bay-Roseburg Highway, between Upper Ten Mile Creek Bridge in Douglas county and the south city limits of Coquille in Coos county, excluding within the corporate limits of Myrtle Point.
- Corvallis-Newport Highway, between Wren in Benton county and the east city limits of Newport in Lincoln county, excluding within the corporate limits of the city of Toledo.
- Crater Lake Highway between the north city limits of Medford in Jackson county and the junction with The Dalles-California Highway in Klamath county, excluding the section between the boundaries of Crater Lake National Park.
- Klamath Falls-Lakeview Highway, between the east city limits of Klamath Falls and Bonanza, in Klamath county.
- McMinnville-Tillamook Highway, between the junction with the West Side Pacific Highway in Yamhill county and Hebo in Tillamook county, excluding within the corporate limits of the cities of Sheridan and Willamina.
- Mt. Hood Loop Highway, between the Multnomah County Line and the Hood River County Line, in Clackamas county, excluding within the corporate limits of Sandy.
- Prineville-Lakeview Highway, all macadamized portions between a point 7 miles south of Summer Lake Post-office and New Pine Creek, in Lake county, excluding within the corporate limits of the city of Lakeview.
- Redwood Highway, between the junction with the Pacific Highway at Grants Pass and the O'Brien Schoolhouse, in Josephine county.

Roosevelt Coast Highway, between Seaside in Clatsop county and Mohler in Tillamook county; between Brighton and Rockaway and between Hobsonville and Wilson River, in Tillamook county, and between Pleasant Valley in Tillamook county and the Siletz River in Lincoln county.

Roosevelt Coast Highway, between Lakeside and Glasgow, and between the south city limits of Coquille and the east city limits of Bandon, in Coos county; between the Coos County Line and Denmark, between Mussel Creek and Euchre Creek, between Gold Beach and Hunters Creek, and between Brookings and the California State Line, in Curry county.

The Dalles-California Highway, between Beaver Marsh and the California State Line near Malin, in Klamath county, excluding within the corporate limits of Klamath Falls and Merrill.

Willamette Highway, between Goshen and Lowell, in Lane county.

Willamette Valley-Florence Highway, between Ceshire and Rainrock, in Lane county.

And it is further ordered, that a notice be posted in a conspicuous manner and place at each end of each of the above-named highways, and at important crossroads on each of said highways, so that said notice can be readily seen and read, which said notice shall state plainly the limitations and prohibitions of traffic hereby in this order determined and fixed.

And be it further ordered, that a certified copy of this order be furnished to the county clerk of each county in which any of said highways are located, and that a certified copy of said order be furnished the Chief of the Traffic Enforcement Division for his information.

Dated this 15th day of September, 1925.

OREGON STATE HIGHWAY COMMISSION,

By WM. DUBY, Chairman,

H. B. VAN DUZER, Commissioner,

W. H. MALONE, Commissioner.

Attest:

ROY A. KLEIN,

State Highway Engineer and Secretary.

SUPREME COURT OF THE UNITED STATES.

No. 372.—OCTOBER TERM, 1926.

R. B. Morris, Doing Business as Morris & Lowther; H. M. Hewitt and Lew Nunamaker, etc., et al., Appellants, <i>vs.</i> Wm. Duby, H. B. Van Duzer, and W. H. Malone, etc.	}	Appeal from the District Court of the United States for the District of Oregon.
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[April 18, 1927.]

Mr. Chief Justice TAFT delivered the opinion of the Court.

The plaintiffs below, the appellants here, owned and operated for hire, under proper license, motor trucks on the Columbia River Highway in Oregon, from the east boundary of Multnomah County to the west limits of the city of Hood River, a distance of 22.11 miles. This Highway extends from Portland to The Dalles, Oregon, and is a rural post road. The plaintiffs have complied with all the state rules and regulations respecting the operation of motor trucks upon the Highway, and under previous regulations carried a combined maximum load of not exceeding 22,000 pounds. The Highway Commission under a law of Oregon has reduced the maximum to 16,500 pounds by an order, in which the Commission recites that the road is being damaged by heavier loads. The plaintiffs filed this bill to enjoin the enforcement of the order, on the ground that it invades their Federal constitutional rights.

The case was heard under section 166 of the Judicial Code as amended by the Act of February 13, 1924, c. 229, 43 Stat. 926, before a court of three judges on an order to show cause why a preliminary injunction should not issue restraining the Commission from enforcing the order. A motion to dismiss was interposed to the complaint by the defendant and submitted at the same time. The District Court denied the application for a preliminary injunction, and granted the motion to dismiss the plaintiff's amended

bill, on the ground that it did not state facts sufficient to constitute a cause of action or to entitle the plaintiffs to the relief demanded. As the plaintiffs refused to plead further, the cause was dismissed, and the case comes here directly from the District Court by virtue of paragraph 3 of section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936.

The Secretary of Agriculture, by virtue of three Acts of Congress, one of July 11, 1916, c. 241, 39 Stat. 355, an amendment thereto of February 28, 1919, c. 69, 40 Stat. 1189, 1200, and the Federal Highway Act of November 9, 1921, c. 119, 42 Stat. 212, is authorized to cooperate with the States, through their respective highway departments, in the construction of rural post roads. These require that no money appropriated under their provisions shall be expended in any State until it shall by its legislature have assented to the provisions of the Acts. They provide that the Secretary of Agriculture and the State Highway Department of each State shall agree upon the roads to be constructed therein and the character and method of their construction. The construction work in each State is to be done in accordance with its laws, and under the supervision of the State highway department, subject to the inspection and approval of the Secretary and in accord with his rules and regulations made pursuant to the Federal Acts. The States are required to maintain the roads so constructed according to their laws. In case of failure of a State to maintain any highway within its boundaries after construction or reconstruction, the Secretary is authorized to proceed on notice to have the highway placed in proper condition of maintenance, at the charge and cost of the federal funds allotted to the State, and henceforth to refuse any further project in such State until the State shall reimburse the Government for such maintenance and shall pay into the Federal Highway Fund for reapportionment among all the States the sum thus expended.

By section 5, chapter 237, of the General Laws of Oregon for 1917, the Oregon Highway Law was passed. That creates a highway commission with authority to carry out the provisions of the Act and to exercise general supervision over all matters pertaining to the construction of state highways and to determine the general policy of the highway department. By section 5, the Oregon Legislature assents to the provisions of the Act of Congress of 1916,

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...ing aid in the construction of rural post roads, and the Defendant is authorized to enter into all contracts and agreements with the National Government relating to the survey, construction, improvement and maintenance of the roads under the Act of Congress, and to submit any scheme of construction as may be required by the Secretary of Agriculture, and to do all things necessary to carry out the cooperation contemplated by the Act. The good faith of the State is pledged to make the available funds sufficient to meet the funds apportioned to the State by the Government, and to maintain the roads constructed or improved with the aid of moneys so appropriated and to make adequate provision for carrying out such maintenance. By the General Laws of Oregon, 1917, chapter 28, c. 194, p. 256, 268, in force when the first Federal Highway Act was passed, it was provided that no motor truck of over ten tons capacity should be driven or operated on any road or highway of the State except with the consent and upon a permit granted by the county court of the county wherein such truck was to be driven or operated, and this was the provision of law in force when the law was passed accepting the Federal Acts for Oregon. By the General Laws of Oregon of 1921, c. 371, section 1, it was provided that the Highway Commission and the county court might grant special permits to permit any vehicle carrying with its load a combined weight in excess of 22,000 pounds, to move on the highways, the permission to be written and to include such terms, rules and stipulations as the Commission or court might deem proper. By section 36 of the same Act, whenever in the judgment of the State Highway Commission or any county court or board of county commissioners of any county it would be for the best interests of the State or county and for the protection from undue damage of any highway or highways or any vehicles thereon, to reduce the maximum weights and speeds in the Act provided for vehicles moving over or upon the highways of the State, and to fix the reduced weights and speeds and prohibit the use of such highways for any other weights, authority is hereby given to such Commission or Board to do so and to post a notice of such limitation.

The order complained of, set forth as an exhibit to the amended complaint, recites that the Commission, as a result of due investigation, finds that the road is being damaged and injured

on account of the kind and character of traffic now being hauled over it, and that the loads of maximum weight moved at the maximum speed are breaking up, damaging and deteriorating the road, and that it will therefore be for the best interests of the state highway that the maximum weight be reduced from 20,000 to 16,500, and that changes be made with respect to tires and their width.

The amended bill gives a history of the highway and its continued use for a weight of 22,000 pounds for four years, which has been availed of by the appellants as common carriers and as members of an Auto Freight Transportation Association of Oregon and Washington, with costly terminals in Portland established by requirement of that city; that the 22 miles in length of the Columbia River Highway here involved is a part of the interstate highway from Astoria, Oregon, into the State of Washington and all subject to the Federal Highway Acts, and that this order will interfere with interstate commerce thereon. The amended bill denies the damage to the road as found by the Highway Commission, and says that the reduction of the limit will be unreasonable, arbitrary and discriminatory. It avers that the plaintiffs have been engaged in active competition with steam railroads paralleling the Columbia River Highway and charging rates of traffic which unless the appellants can use trucks combined with loads of 22,000 pounds will prevent their doing business except at a loss. It alleges that the Acts of Congress and of Oregon constitute a contract by which the permission for the use of a five-ton combined weight of truck and load is a term which can not be departed from by the State Highway Commission, and constitutes a protection to the plaintiffs of which they may avail themselves in this action.

An examination of the acts of Congress discloses no provision, express or implied, by which there is withheld from the State its ordinary police power to conserve the highways in the interest of the public and to prescribe such reasonable regulations for their use as may be wise to prevent injury and damage to them. In the absence of national legislation especially covering the subject of interstate commerce, the State may rightly prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use applicable alike to vehicles moving in interstate commerce and those of its own citizens. *Hendrick v. Maryland*, 235 U. S. 610, 622, *et seq.*; *Kane v. New Jersey*, 242 U. S.

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0, 167. Of course the State may not discriminate against interstate commerce. *Buck v. Kuykendall*, 267 U. S. 307. But there is no sufficient averment of such discrimination in the bill. In the *Kuykendall* case this Court said, p. 315:

"With the increase in number and size of the vehicles used upon highway, both the danger and the wear and tear grow. To exclude unnecessary vehicles—particularly the large ones commonly used by carriers for hire—promotes both safety and economy. State regulation of that character is valid even as applied to interstate commerce, in the absence of legislation by Congress which deals specifically with the subject. *Vandalia R. R. Co. v. Public Service Commission*, 242 U. S. 255; *Missouri Pacific Ry. Co. v. Arabee Flour Mills Co.*, 211 U. S. 612. Neither the recent federal highway acts, nor the earlier post road acts, Rev. Stat., par. 964; Act of March 1st, 1884, c. 9, 23 Stat. 3, do that."

The mere fact that a truck company may not make a profit unless it can use a truck with load weighing 22,000 or more pounds does not show that a regulation forbidding it is either discriminatory or unreasonable. That it prevents competition with freight traffic on parallel steam railroads may possibly be a circumstance to be considered in determining the reasonableness of such a limitation, though that is doubtful, but it is necessarily outweighed when it appears by decision of competent authority that such weight is injurious to the highway for the use of the general public and unduly increases the cost of maintenance and repair. In the absence of any averments of specific facts to show fraud or abuse of discretion, we must accept the judgment of the Highway Commission upon this question which is committed to their decision as against merely general averments denying their official finding.

Nor is there anything either in the Federal or State legislation to support the argument that the agreement between the National and State government requires that the weight of truck and load which was permitted by the State when the agreement was made binds the State contractually to continue such permission. Confining limitation is something that must rest with the road supervising authorities of the State not only on the general constitutional distinction between National and State powers but also for the additional reason having regard to the argument based on a contract that under the convention between the United States and the State in respect to these jointly aided roads, the maintenance after

construction is primarily imposed on the State. Regulation as to the method of use therefore necessarily remains with the State and can not be interfered with unless the regulation is so arbitrary and unreasonable as to defeat the useful purposes for which Congress has made its large contribution to bettering the highway systems of the Union and to facilitating the carrying of the mails over them. There is no averment of the bill or any showing by affidavit making out such a case.

The temporary injunction was rightly refused and the motion to dismiss the bill was properly granted.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.